S. HRG. 103–506

ERISA PREEMPTION OF STATE PREVAILING WAGE LAWS

HEARING

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 1580

EXAMINING THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 THAT IT DOES NOT PREEMPT CERTAIN STATE PREVAILING WAGE LAWS

MARCH 10, 1994

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE

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ADDITIONAL MATERIAL

ERISA PREEMPTION OF STATE PREVAILING WAGE LAWS

THURSDAY, MARCH 10, 1994

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:38 p.m., in room SD–430, Dirksen Senate Office Building, Senator Harris Wofford presiding.

Present: Senators Kennedy, Wofford, and Durenberger.

OPENING STATEMENT OF SENATOR WOFFORD

Senator Wofford [presiding.] This hearing will come to order.

Today the Committee on Labor and Human Resources meets to hold a hearing on ERISA preemption of certain State laws. As some of you well know, the weather prevented us from holding this hearing on February 11. I thank witnesses for being able to come back here today especially those who came through the bad weather and met with me for a little while. We are glad to have you here and all of the witnesses today.

During the past several years, courts have held that the Employee Retirement Income Security Act of 1974 preempted the ability of States to establish prevailing wage laws, fix the terms and conditions of apprenticeship programs, and enact mechanics lien laws, all of which are traditional State prerogatives.

Before coming to the Senate, I was Pennsylvania's Secretary of Labor and Industry and I was responsible for the Bureau of Prevailing Wage and the Office of Apprenticeship and Training. I came to have a special appreciation of our apprenticeship programs and how they contribute to a skilled work force.

Recently, I attended a statewide conference called "Preparing Today's Youth for Tomorrow's Jobs," in Monroeville, PA. At the conference, William Unitas, educational coordinator for the United Brotherhood of Carpenters Joint Apprenticeship Committee noted that on their apprenticeship application tests, numerous scores were as low as two out of 100 in mathematics.

Besides the question of how the schools were doing in training those who would not be going to college, the need for more well-run apprenticeship training was emphasized. It could not have been more evidence from the evidence we heard that day.

Decisions by several courts in recent years have made the situation worse. Just last July, a Federal court totally invalidated Penn-

sylvania's prevailing wage law, which threatens the State's ability to establish apprenticeship training programs.

Senator Specter, who is here with us today, can attest to the potential difficulties our State faces in this area. I am very glad he has joined us today and that he has taken the initiative here that we are joining him in.

I would remind all witnesses to keep their oral presentations to 5 minutes, and your entire statements I assure you will be printed in the record of today's hearing.

I welcome my Pennsylvania colleague, the senior Senator from Pennsylvania, the Honorable Arlen Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. I would begin by commending you for holding this important hearing, and as already noted, my extensive statement will be placed in the record and I will, consistent with the rules of the committee, summarize.

This legislation was introduced by Senator D'Amato and myself back on October 21st of last year to create three narrow exceptions to Section 514, the preemption provision of the Employee Retirement Income Security Act, known popularly as ERISA.

The United States District Court for the middle district of Pennsylvania handed down a decision in a case captioned Keystone Chapter v. Foley, which ruled that certain important provisions of State law were invalid because of what is known as a preemption provision of Federal law.

A preemption provision is an interpretation of the courts that certain State laws are said to be inconsistent with Federal laws where there is no expressed provision to that effect, but it is a matter of judicial interpretation. The Congress has the authority to clarify the law and to overrule what the district court has done, and this is not a constitutional issue which is beyond statutory clarification or statutory amendment. And this bill would make it plain that it is not the intent of Congress that the ERISA laws should preempt the laws of the Commonwealth of Pennsylvania in three respects—first, as to prevailing rates on public works projects; second, as to State laws concerning apprenticeship; and third, as to State laws providing for security liens, bonds, or otherwise for the collection of contributions to multiemployer pension, health, and welfare plans.

It has been the tradition of the Federal system that the States would have the authority and the jurisdiction and the responsibility to pass laws on such subjects, and where the Federal Government comes into the field, it does so, under our Federal system, with limited authority. And with all due respect to the judicial decision here, I do not believe that that was what Congress had originally intended. But be that as it may, the way to clarify it is to grant exemptions from the ERISA preemption laws, which is what this bill would do.

The purpose of the prevailing rate laws of 31 States is to protect local wage standards, to promote fair competition among bidders, and to maintain quality work standards for public projects. This is

especially important, Mr. Chairman, when you take up issues like poorly constructed buildings and bridges and roads which may be built by those who are paying substandard wages, which traditionally leads to substandard work under the very basic concept that you get what you pay for.

So the Commonwealth of Pennsylvania has declared it as a matter of State public policy that these prevailing rates are to be paid in the public interest. And this bill would make it plain that Congress does not intend to usurp that State authority or to preempt what the State of Pennsylvania has done.

Second, with respect to the apprenticeship program, the decision of the Federal court has upset the laws relating to apprenticeship. The individual States have taken a look at the apprenticeship programs and decided what is in the public interest. Some concern has been raised that there will be an adverse or punitive effect on minorities and women, currently unrepresented in nontraditional jobs. The General Accounting Office March 1992 report on "Apprenticeship and Equal Opportunity" found that the existing regulations have successfully increased representation, especially among minorities, in apprenticeship programs.

The Tradeswoman of Philadelphia is an excellent example of a private job training and apprenticeship program receiving State assistance that places women, many of them minorities, into nontraditional fields such as construction and maintenance. This is a demonstration of the wisdom of the public policy of the State in its legislation on apprenticeships.

The third face, Mr. Chairman, involves the State laws governing securities, liens, and bonds where such security interests have traditionally been a matter for State law. And the decision in the Foley case, I think, was an unfortunate extension which will be corrected by this bill.

Mr. Chairman, as you know, there is companion legislation in the House, and this hearing is to provide all those who have any objections to come forward and have an opportunity to be heard.

I have been contacted, Mr. Chairman, by people who are concerned about some of the provisions of the bill, and I want to make it clear that I am open to hearing comments by anyone who has some concern. The process before the subcommittee is a first step which would then lead to action by the full committee, and if approved, then go to the floor of the Senate. There is ample time for consideration of anybody who has any views to express, if not today, then at any time between now and the time the matter comes up before the full Senate.

So I want to give my assurances that I am prepared to listen, but based upon the examination, research and study that I have done up to the present time, it is my judgment that this is an important bill for the Commonwealth and for the country.

[The prepared statement of Senator Specter follows:]

PREPARED STATEMENT OF SENATOR SPECTER

Mr. Chairman, I thank the Committee for the opportunity to testify this afternoon.

I am here this afternoon to testify in support of S. 1580, a bill I introduced with the co-sponsorship of Senator D'Amato on October 21, 1993 that would create three narrow exceptions to Section 514, the preemption provision of the Employee Retire-

ment Income Security Act, also known as ERISA. Under the Specter-D'Amato bill, as with its identical House companion legislation, H.R. 1036, three types of State laws are exempted from the ERISA preemption: Those providing for the payment of prevailing rates on public works projects; State laws concerning apprenticeship, and last, those State laws providing for security, liens, bonds or otherwise, for the collection of contributions to multiemployer pension, health and welfare plans. The House bill passed with overwhelming bipartisan support in November of last year, and I am hopeful S. 1580 will do likewise herein the Senate in the near future.

Since the enactment of ERISA in 1974 a series of court decisions have held these three types of state laws invalid because they relate to, and therefore, are preempted by ERISA. These laws are not an intrusion upon an area of critical concerto ERISA. State laws concerning prevailing rates, apprenticeship programs and mechanics liens exist not to thwart the intent and goals of ERISA, but to further legitimate and traditional state interests. As a matter of public policy, these are areas where the ERISA preemption should not apply. Like ERISA, the intent of the State is to protect workers. Instead of protecting American workers, the judicial decisions have taken from the states their traditional role of using statutory guidelines to regulate the terms and conditions of employment for public work projects or to govern apprenticeship and education programs within their borders. In my testimony I will highlight two of those issues regarding prevailing rates and apprenticeship programs.

The purpose of prevailing rate laws of 31 states is to protect local wage standards, promote fair competition among bidders and to maintain quality work standards for public work projects. Prevailing wage laws existed long before the enactment of ERISA. Unfortunately, courts, by use of the ERISA preemption have taken from the states their well established right to mandate a minimum rate for public works projects

Some states, in their informed judgment, have decided that their prevailing rates may be met with a combination of minimum benefits and cash wages. Generally, under State law, the prevailing rate or minimum wage for public works projects must equal a certain amount in cash wage payments to the employees. The cash wage amount may be met by paying employees the cash equivalent of fringe benefits, regardless of whether that fringe benefit is covered by ERISA or not.

Prevailing rates are simply the manifestation and means of enforcement of a State's decision that as a matter of public policy employees on its public works projects should receive a minimum amount of cash payments as compensation. Fringe benefits are a rewarding form of compensation. However, one cannot make a mortgage payment, for instance, with a paid holiday, or buy groceries with a dental care plan.

Union contractors, bound by collective bargaining agreements, face the dilemma of being consistently underbid by non-union contractors, who may vary their wage and benefit rates. My legislation, like that of the House, serves to level the playing field for all who bid on public works projects. But most important is the effect on workers. Prevailing rate statutes provide that decent wages will be paid for decent work on public works projects.

During the past summer the entire prevailing rate statute for the state of Pennsylvania was held invalid by the federal court of the middle district of Pennsylvania in the case of Keystone Chapter Associated Builders and Contractors Inc., v. Foley. If this decision is upheld on appeal, Pennsylvania's ability to protect workers on public works projects from construction employers paying substandard wages and benefits will be greatly diminished. It will also be much more difficult for Pennsylvania to protect the public from poorly constructed buildings, bridges and roads built by contractors paying substandard wages for substandard work.

As the new emphasis on programs such as "School to Work" has illustrated, apprenticeship and vocational programs are, in fact, education programs. It is long established that States have a compelling interest in the integrity of its education programs, and the right to enact measures to ensure that integrity. Twenty-seven states have exercised this right by enacting legislation regulating apprenticeship programs. The Federal government has recognized and fostered State participation in the regulation of apprenticeship programs by passing the Fitzgerald Act in 1937, legislation establishing a partnership of federal and state government in the administration of apprenticeship programs.

As with prevailing rates, States have extended their supervision of apprenticeship program to public work projects where apprentices may be employed. The individual States have mandated that the employment and training of apprentices on public works projects, as a matter of public policy, must be State-approved and regulated. Despite the fact that the ERISA preemption does not apply to other Federal laws, Federal courts have invalidated laws regulating apprenticeship programs; programs

facilitated by the Fitzgerald Act. Many, in the Congress and the administration have recognized the need to upgrade the American workforce through training. Application of the ERISA preemption in this area hinders, rather than furthers this goal.

Some non-union employers allege that the application of the ERISA preemption to apprenticeship programs is necessary because, left to their own standards, States have discriminated in favor of union apprenticeship programs. While there may be some truth to the assertion that union apprentice programs are approved by States more frequently than non-union programs, it is reasonable to believe that the cause may lie in the unions' long established and effective apprenticeship programs, rather than any discrimination against non-union programs.

However, there are very effective remedies available to any non-union employer believing their apprenticeship programs was treated unfairly under a State program: The employer may seek recourse under State law, or more importantly, work with the department or commission of labor within that state, or through the State legislature to change those laws effecting apprenticeship programs.

Although it is inevitable that Federal programs concerning worker training will evolve over the upcoming year, it is also time to revisit the Fitzgerald Act. The workforce and the skills necessary to compete for jobs have changed immensely in the 57 years following Fitzgerald's passage. I believe that many of the criticisms of Federal-State apprenticeship programs may be effectively addressed by hearings on that topic.

I am also aware that opponents to the legislation believe that its passage will adversely affect minorities and women currently under-represented in non-traditional jobs. Equal employment opportunity requirements are enforced at both the State and Federal level. The General Accounting Office's March 1992 report on apprenticeship and equal opportunity found that existing regulations have successfully increased representation, especially among minorities, in apprenticeship programs. An especially large increase has been seen in the traditional building trades and in the public sector.

Tradeswomen of Philadelphia is an excellent example of a private job training and apprentice program receiving state assistance that places women, many of them minority, into nontraditional fields such as construction and maintenance. The average starting salary for graduates of this program is an astounding hourly rate of $12.00 with full benefits. In fact, Tradeswomen of Philadelphia was recently recognized by the Department of Labor as an example of the type of apprenticeship and job training necessary for America's workforce. Tradeswomen of Philadelphia, with assistance from the state of Pennsylvania is improving the lives of its graduates and the state economy. This is the same result sought by apprenticeship programs in other States. I believe State regulation of apprenticeship programs will result in continued opportunity for full and equal employment.

Mr. Chairman, in closing, I add that my legislation will not require a State to enact any law, or more importantly interfere with ERISA's regulatory scheme for employee benefit plans. Rather, this legislation restores to the States their traditional right to establish and oversee programs ensuring protection of those working within their respective borders, which as a matter of public policy should not be preempted by ERISA. My bill merely clarifies that certain, narrow areas of worker protection namely, remain in the States' domain.

Again, Mr. Chairman, I thank you for this opportunity to discuss my legislation.

Senator WOFFORD. I have just a few questions to clarify your bill. Nothing in the bill would require an employer to establish an employee pension or health plan, or to offer any particular benefit; is that correct?

Senator SPECTER. That is correct. There is nothing within this bill which would impose that kind of an obligation on any employer.

Senator WOFFORD. There is nothing in ERISA that expressly prohibits a State from maintaining a prevailing wage law. We are dealing here with court interpretations of that law, or interpretations of what Congress intended under that law; is that correct?

Senator SPECTER. That is correct, Mr. Chairman. The expectation had been held as a general matter prior to the decision in Associated v. Foley that the States could legislate, and that had been the activity until this litigation was brought. There was no expressed

provision in ERISA, in the Federal law, on its face to prohibit the States from exercising jurisdiction in these three important lines.

Senator WOFFORD. There is nothing in this bill that would require a State to enact or to retain a prevailing wage law or an apprenticeship law or a mechanic's lien law; is that correct? The bill merely removes ERISA as an unintended barrier to the States exercising their traditional powers.

Senator SPECTER. That is correct. Anyone who opposes those laws has a full opportunity to stake their appeal at the State level. This is not a declaration by the Congress, and it is not intended by this bill by Senator D'Amato and myself as the two sponsors to impose that obligation on the State. If somebody has objection, the proper place to level it is with the State. What this bill does in its fundamental terms is say that is a matter for State law determination, but the Federal Government has not overruled the State in its decision that those provisions are the best for the public policy of Pennsylvania.

Senator WOFFORD. I will be working with you closely on this issue and look forward to talking with you as we move along and hearing from our colleagues and from others, both in the hearing today and as we move the bill forward.

I thank you.

Senator SPECTER. I thank you, Mr. Chairman.

Senator WOFFORD. If my other colleagues on the committee were here, there would be more questions. You are welcome, if your schedule permits, to join me up here.

Senator SPECTER. Well, Mr. Chairman, I recently had an opportunity to entertain questions from quite a number of people who were on a panel. It was across the street at the U.S. Supreme Court chambers. Only seven of the nine chose to question, most of them at the same time. I found the most interesting part was when the Justices interrupted each other. I did not find it quite so interesting when they interrupted me. But that was part of the process, and I might say that——

Senator WOFFORD. We have made it easy for you today.

Senator Specter [continuing.] Well, I thank you for that. I can use the relief. Thank you.

Senator WOFFORD. Well, may I just add that I was one of the people who was lucky enough to hear Senator Specter's argument before the U.S. Supreme Court. It is always a privilege to hear Senator Specter on the floor. It was an extraordinary experience to see my colleague make an argument as powerfully as he did. If he makes that kind of a case for this bill that he is presenting on the floor of the Senate, I would think its prospects would be very good.

Senator SPECTER. Thank you, Mr. Chairman. I will leave my prepared comments, and I am sorry that I have other duties and cannot stay, because there are many friends in the audience. You have a full house, and if everyone is heard, you will be here until tomorrow.

Thank you.

Senator WOFFORD. See you then.

The second panel includes Joe Dart, Frank Lalley, and Howard Benjamin. We are changing the order to have Mr. Lalley, Mr. Benjamin, and Mr. Dart in that order, because Mr. Dart happens to

come from Massachusetts as does Senator Kennedy, who hopes to get here shortly after 3 o'clock. If you do not mind, we will let him have a chance to say a word about his Massachusetts colleague.

Mr. Frank Lalley is a Philadelphia area electrical contractor and the sheriff of my county, Montgomery County, PA. He is representing today the National Electrical Contractors Association.

I welcome you here, Frank Lalley.

STATEMENTS OF FRANK LALLEY, PRESIDENT, NORTH PENN ELECTRIC, INC., NORTH WALES, PA, ON BEHALF OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION; ACCOMPANIED BY LARRY BRADLEY, MANAGER, PENN-DEL-JERSEY CHAPTER; HOWARD E. BENJAMIN, BELLINGHAM, WA, ON BEHALF OF INDEPENDENT ELECTRICAL CONTRACTORS; AND JOE DART, PRESIDENT, MASSACHUSETTS BUILDING TRADES COUNCIL, AFL-CIO, BOSTON, MA

Mr. LALLEY. Thank you, Mr. Chairman.

My name is Frank Lalley. I am an electrical contractor and sheriff of Montgomery County, PA, and the president of North Penn Electric, Incorporated. I have been in the electrical construction business for over 30 years.

I have been a member of the Penn-Del-Jersey Chapter of the National Electrical Contractors Association for 29 years. I have served on numerous chapter committees and have been on the board of directors since 1979.

The National Electrical Contractors Association, NECA, is an organization of electrical construction specialty contractors, speaking nationally for a segment of the construction industry comprised of over 50,000 electrical construction contracting firms. The industry has an annual volume of over $50 billion and employs over half a million electrical workers. NECA has a national staff of 40 and a field staff of 24 operating out of four regional offices.

Accompanying me today is Mr. Larry Bradley, manager of NECA's Penn-Del-Jersey Chapter.

The Penn-Del-Jersey Chapter is one of 122 affiliated NECA chapters in the United States. The primary purpose of the Penn-Del-Jersey Chapter of NECA is to act as a multiemployer bargaining agent for the negotiation and administration of collective bargaining agreements on behalf of the approximately 500 electrical contractors doing business in central, south, and eastern Pennsylvania, parts of New Jersey, and the entire State of Delaware that have authorized it to act as their collective bargaining agent.

All of the collective bargaining agreements negotiated by the Penn-Del-Jersey Chapter of NECA contain provisions authorizing joint employee benefits programs that provide health and welfare, vacation, pension, and other benefits to their employees, including joint apprenticeship and training programs.

I am here today to express my organization's support for H.R. 1036 as passed by the House of Representatives on November 9, 1993, which would exempt from Federal preemption under the Employee Retirement Security Act, ERISA, State laws that regulate prevailing wages and fringe benefits and/or apprenticeship training programs, and State laws that provide for mechanic's liens for the

collection of delinquent contributions to multiemployer employee benefit plans.

This bill is identical to S. 1580, which was recently introduced by Senators Arlen Specter and Alfonse D'Amato.

Pursuant to their collective bargaining agreements with the International Brotherhood of Electrical Workers, IBEW, local union in the area, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA make financial contributions to jointly administered, multiemployer, pension and employee benefit trusts and plans established to provide benefits to their employees, including apprenticeship training programs.

These employee benefits plans, including the apprenticeship training programs, have been recognized under the Pennsylvania, New Jersey, and Delaware prevailing wage laws, as part of the package of wages and fringe benefits that all contractors and subcontractors performing public works jobs subject to these laws must pay in areas within the geographic areas covered by our collective bargaining agreements. Moreover, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA are permitted to pay their employees registered in these electrical apprenticeship training programs less than the prevailing wage and fringe benefits otherwise required by State law because such programs have been approved by State apprenticeship agencies as meeting Federal standards.

As a result, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA are able to provide a complete set of employee benefits, including quality apprenticeship training, and also successfully compete with contractors which do not normally provide such benefits for employees working on State and local public works jobs.

Recently, however, several Federal courts have declared the provisions of many State prevailing wage and apprenticeship training laws preempted because they "relate" to employee benefit plans as defined in ERISA. Most recently, in a case called Keystone Chapter, Associated Builders and Contractors, Incorporated v. Thomas P. Foley, the Federal district court in Scranton, PA declared the entire Pennsylvania Prevailing Wage Act and its accompanying regulations invalid and unenforceable because they are preempted by ERISA.

The net effect of these developments is to discourage skilled mechanics in the electrical and other trades from remaining in the industry because of declining wages and benefits, together with the other undesirable working conditions inherent in the work. In addition, the industry in these States has failed to attract young people in numbers sufficient to meet the future anticipated demand.

Inevitably, safety on the job and the quality of construction work performed under these circumstances has suffered, as has the general economy, which depends on the ability of its consumers, including construction workers, to purchase goods and services, thereby generating demand that encourages job creation and a sound tax base.

Thus, for the sake of reducing the cost of State and local public works projects, which is questionable at best, repeal of State pre-

vailing wage laws has produced much greater problems for such States than they solved.

I understand that the broad preemptive provision in ERISA is intended to round out the protection afforded participants in employee pension and benefit funds by eliminating the threat of conflicting and inconsistent State and local regulation. However, I do not believe that Congress intended this preemption provision to interfere with the ability of the States to regulate areas traditionally reserved to them, such as occupational training, public safety, and minimum wages. Nevertheless that is exactly what the courts are doing with regard to State prevailing wage and apprenticeship laws in the name of ERISA preemption.

Finally, I would like to briefly address the provision in H.R. 1036 that would exempt from ERISA preemption any State law that provides for a mechanic's lien or other lien, bonding, or other security for collection of delinquent contributions to a multiemployer plan. As I indicated, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA are contractually obligated to contribute to various jointly administered pension and employee benefit trust funds and plans. In recent years, some Federal and State courts have ruled that such plans are preempted from using mechanic's liens and other similar State laws to collect contributions owed to them by delinquent employers.

State statutes like the New Jersey Construction Workers' Fringe Benefit Security Act help guarantee that all subcontractors will comply with their contractual obligations to make contributions on behalf of their employees, thereby strengthening the financial integrity of the funds and ensuring that delinquent subcontractors do not realize a competitive advantage over fair employers.

For all these reasons, the Penn-Del-Jersey Chapter of NECA strongly urges this committee to report H.R. 1036 favorably to the floor for action by the Senate at the earliest opportunity in order to reverse court decisions preempting these vitally important State laws and preserving those that have yet to be challenged.

The views I present here represent the policy adopted by the board of governors of the National Electrical Contractors Association and, in that regard, in my expressions of support for this legislation, I speak for the entire national organization.

Thank you.

Senator WOFFORD. Thank you, Frank. I also want to give a special award to Larry Bradley, the executive director of the Penn-Del-Jersey Chapter, for showing up in the snow. He was the first one to show up at the hearing we had to cancel.

Mr. BRADLEY. Thank you, Senator.

[The prepared statement of Mr. Lalley follows:]

PREPARED STATEMENT OF FRANK LALLEY

Mr. Chairman and members of the committee, my name is Frank Lalley, an electrical contractor and sheriff of Montgomery County in Pennsylvania. I am the president of North Penn Electric, Inc., and have been in the electrical construction business for over thirty years. I have been a member of the Penn-Del-Jersey Chapter of the National Electrical Contractors Association for twenty-nine years. I have served on numerous chapter committees and have been on the Board of Directors since 1979.

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construction industry comprised of over 50,000 electrical construction contracting firms. The industry has an annual volume of over $50 billion and employs over one-half of a million electrical workers. NECA has a national staff of 40 and a field staff of 24 operating out of four regional offices.

Accompanying me is Mr. Larry Bradley, manager of NECA's Penn-Del-Jersey Chapter. The Penn-Del-Jersey Chapter is one of 122 affiliated NECA Chapters in the United States. The primary purpose of the Penn-Del-Jersey Chapter of NECA is to act as multiemployer bargaining agent for the negotiation and administration of collective bargaining agreements on behalf of approximately 500 electrical contractors doing business in Central, South, and Eastern Pennsylvania, parts of New Jersey and the entire State of Delaware that have authorized it to act as their collective bargaining agent. All of the collective bargaining agreements negotiated by the Penn-Del-Jersey Chapter of NECA contain provisions authorizing joint employee benefit programs that provide health and welfare, vacation, pension and other benefits to their employees, including joint apprenticeship and training programs.

I am here today to express my organization's support for H.R. 1036 as passed by the House of Representatives on November 9, 1993, which would exempt from federal pre-emption under the Employee Retirement Security Act ("ERISA"), state laws that regulate prevailing wages and fringe benefits and/or apprenticeship training programs, and state laws that provide for mechanic's liens for the collection of delinquent contributions to multiemployer employee benefit plans. This bill is identical to S. 1580 which was recently introduced by Senators Arlen Spector and Alfonse D'Amato.

Pursuant to their collective bargaining agreements with the International Brotherhood of Electrical Workers ("IBEW") Local Unions in the area, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA make financial contributions to jointly-administered, multiemployer, pension and employee benefit trusts and plans established to provide benefits to their employees, including apprenticeship training programs.

These employee benefits plans, including the apprenticeship training programs, have been recognized under the Pennsylvania, New Jersey, and Delaware prevailing wage laws, as part of the package of wages and fringe benefits that all contractors and subcontractors performing public works jobs subject to these laws must pay in areas within the geographic areas covered by our collective bargaining agreements. Moreover, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA are permitted to pay their employees registered in these electrical apprenticeship training programs less than the prevailing wage and fringe benefits otherwise required by state law because such programs have been approved by state apprenticeship agencies as meeting federal standards.

As a result, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA are able to provide a complete set of employee benefits, including quality apprenticeship training, and also successfully compete with contractors which do not normally provide such benefits for employees working on state and local public works jobs. Recently, however, several federal courts have declared the provisions in many state prevailing wage ad apprenticeship training laws pre-empted because they "relate" to employee benefit plans as defined in ERISA Most recently, in a case called Keystone Chapter, Associated Builders & Contractors, Inc. v. Thomas P. Foley, the federal district court in Scranton, Pennsylvania declared the entire Pennsylvania Prevailing Wage Act and its accompanying regulations invalid and unenforceable because they are preempted by ERISA.

I am sure that Senator Wofford, who was formerly the Secretary of Labor and Industry for the Commonwealth of Pennsylvania, understands that the effect of the court's order, which would effectively repeal the Pennsylvania Prevailing Wage Act if upheld, would be devastating, not only to the electrical contractors represented by the Penn-Del-Jersey Chapter of NECA, but to the entire Commonwealth of Pennsylvania. In other states that have repealed their prevailing wage laws in the last 10 or 15 years, the absence of a wage and benefit floor caused average wage and benefit levels in the local construction industry to fall substantially. Likewise, participation in apprenticeship training declined or, in some trades, ceased altogether because employers became free to pay unskilled and semi-skilled workers reduced wages without investing in formal training programs, as formerly required under the prevailing wage laws.

As a result, many employers in these states no longer screen applicants very carefully to determine whether they have the aptitude and attitude necessary to maintain a long-term attachment to the building construction industry. Consequently, the turnover rate among newly-hired construction workers in these states has risen substantially.

The net effect of these developments is to discourage skilled mechanics in the electrical and other trades from remaining in the industry because of declining wages and benefits together with the other undesirable working conditions inherent in the work. In addition, the industry in these states has failed to attract young people in numbers sufficient to meet the future anticipated demand.

Inevitably, safety on the job and the quality of construction work performed under these circumstances has suffered, as has the general economy which depends on the ability of its consumers, including construction workers, to purchase goods and services thereby generating demand that encourages job creation and a sound tax base.

Thus, for the sake of reducing the cost of state and local public works projects, which is questionable at best, repeal of state prevailing wage laws has produced much greater problems for such states than they solved.

I understand that the broad preemption provision in ERISA is intended to "round out the protection afforded participants [in employee pension and benefits funds] by eliminating the threat of conflicting and inconsistent State and local regulation." However, I do not believe that Congress intended this broad preemption provision to interfere with the ability of the states to regulate areas traditionally reserved to them such as occupational training, public safety and minimum wages. Nevertheless, that is exactly what the courts are doing with regard to state prevailing wage and apprenticeship laws in the name of ERISA preemption.

Finally, I would like briefly to address the provision in H.R. 1036 that would exempt from ERISA preemption any state law that provides for a mechanic's lien or other lien, bonding, or other security for collection of delinquent contributions to a multiemployer plan. As I indicated, electrical contractors represented by the Penn-Del-Jersey Chapter of NECA are contractually obligated to contribute to various jointly administered pension and employee benefit trust funds and plans. In recent years, some Federal and State courts have ruled that such plans are preempted from using mechanics' liens and other similar state laws to collect contributions owed to them by delinquent employers.

For instance, the Federal appeals court in Philadelphia held in 1991 that New Jersey Construction Workers' Fringe Benefit Security Act is preempted by ERISA. This statute expressly provides that upon receipt of notice from the trustees of a benefit fund that a subcontractor is delinquent in payments to the fund, public and private project owners must withhold from sums otherwise due the prime contractor, and hold in trust for 45 days, a sum equal to the amount claimed due by the benefit fund. Within that time, the delinquent subcontractor can contest the claim, whereupon the benefit fund can then initiate a law suit to collect the alleged delinquent payments. During this time, the project owner can either hold the contested funds or deposit them with the clerk of the Superior Court. Of course, if the delinquent subcontractor fails to contest the benefit fund's claim, the project owner can then release the delinquent payment to the benefit fund. This highly effective remedy is no longer available to employee benefit plans.

State statutes like the New Jersey Construction Workers' Fringe Benefit Security Act help guarantee that all subcontractors will comply with their contractual obligation to make contributions on behalf of their employees, thereby strengthening the financial integrity of the funds, and insuring that delinquent subcontractors do not realize a competitive advantage over fair employers.

For all these reasons, the Penn-Del-Jersey Chapter of NECA strongly urges this Committee to report H.R. 1036 favorably to the floor for action by the Senate at the earliest opportunity in order to reverse court decisions pre-empting these vitally important state laws, and preserving those that have yet to be challenged. The views I present here represent the policy adopted by the Board of Governors of the National Electrical Contractors Association and—in that regard—in my expressions of support for this legislation I speak for the entire national organization. Thank you.

Senator WOFFORD. Senator Durenberger, do you wish to make any opening statement?

Senator DURENBERGER. Thank you, Mr. Chairman. I do have a statement, and I would like to have it made part of the record if I may.

Senator WOFFORD. Without objection, of course, it will be.

[The prepared statement of Senator Durenberger follows:]

PREPARED STATEMENT OF SENATOR DURENBERGER

Senator Wofford, thank you for holding this important hearing . Senator Specter, it is an honor to have you appear before our committee today.

The legislation we are hearing testimony on today, S. 1580, would amend the Employee Retirement Income Security Act ("ERISA") to clarify that three types of State laws are not preempted by ERISA:

1. State laws requiring the payment of prevailing wages on public work projects;

2. State laws regulating apprenticeship training and employment; and

3. State laws providing for mechanics' liens, other liens, bonding, or other security for the collection of employer contributions to multiemployer pension, health, and welfare plans.

A number of recent court decisions have invalidated these State laws on the grounds that they "related to" benefit plans and therefore are covered by the broad preemption provisions of ERISA.

Let me say at the outset that I have always supported the States' prerogative to require the payment of prevailing wages on public projects, to regulate apprenticeship training and employment, and to protect workers' wages through the enactment of mechanics' lien laws. In addition, I have been one of the most consistent and steadfast champions of Federal prevailing wage and apprenticeship training laws—which are analogous to the various State laws at issue here—during my 16 years in this body.

At the same time, I am also extremely concerned that we not act to erode ERISA's premption provisions in ways that could lead to increased benefit costs—including health care costs—at a time when American workers and businesses absolutely cannot afford to shoulder these additional burdens.

Thanks in large part to the leadership of President and Mrs. Clinton, we are closer now than we have ever been to enacting comprehensive national health care legislation. No matter what form that legislation may eventually take, I am confident that we will begin this year to set up a comprehensive system of national health care rules.

In general, I don't believe this is the time to undercut that national system by allowing each State and every locality to enact laws that would mandate specific benefits and have the effect of increasing health care costs.

One of the principal reasons Congress enacted ERISA in 1974 was to foster growth of employee benefit plans by promoting uniform Fede4ral regulation of those plans. In order to accomplish that goal, Congress recognized the importance of eliminating the threat of inconsistent and conflicting State and local regulations of employee benefit plans, especially for multi-State and multi-locality businesses.

Therefore, I have some questions as to whether S. 1580, as currently drafted, is an appropriate response to the court decisions that have overturned State prevailing wage laws and mechanics' lien laws. I hope that many of those questions are answered by today's testimony.

Senator Wofford, let me stress in closing my strong willingness and desire to work with the sponsors of S. 1580 and with may colleagues on this committee to fashion legislation that allows States to protect the rights of workers on public projects while ensuring that we do not frustrate the purpose of ERISA, or do any thin to increase benefits costs or jeopardize national health reform.

Thank you. I look forward to today's testimony.

Senator WOFFORD. Next, Howard Benjamin is representing the Independent Electrical Contractors, of Bellingham, WA. Thank you very much for coming.

Mr. BENJAMIN. Thank you very much, Senator, for this opportunity.

Mr. Lalley and NECA are especially here for Pennsylvania and New York. I have no specific knowledge of those States. I can only speak for Washington State and my familiarity with situations we have out there, through Washington, Oregon, California, Nevada, Idaho, and also impacts the State of Alaska.

The recent Ninth Circuit Court rulings out in that area impacted this six-State area positively. I personally have been involved in getting our apprenticeship standards approved through the State of Washington for a nonunion apprenticeship program. We have been refused based on their interpretation of parallel programs.

Now, I have submitted my letter, and I will not highlight that so much since it is in the record, but these amendments to ERISA, I can appreciate some of the difficulties on the prevailing wage issue, but my concern, being involved personally in our apprenticeship program, is that I am fully convinced that our program would be decertified if these amendments pass granting full leeway back to the individual States.

For the record, I brought copies of those minutes, that when our standards were approved, unprecedented in the history of the Washington State Apprenticeship Training Council's history, they attached a rider to our approval requiring a 6-month review of our program. On advice of their legal counsel, they reconsidered; from my understanding, their legal interpretation was that it was discriminatory, and they dropped that requirement.

Since this time, we work every step of the way, trying to develop a cooperative atmosphere. I personally experienced that in the hearings, that as an employee representative, I was treated as a nonentity because I was nonunion. The council consistently applied that there was an employee representative, even though in Washington State, the RCWs and the WAC groups both address those persons known to represent employee interests. That is where I had my difficulty in that that aspect in Washington State was totally ignored. And except for the ABC v. McDonald case in the Tenth Circuit Court has Washington State consequently recognized our application and approved our standards, with the condition that we remove all reference to employee involvement in our apprenticeship program, that it is strictly an employer program, as recognized by the State.

There is great concern there that those interpretations based on State interpretation will be reapplied, and our program will be decertified. We have the numbers on the percentage of nonunion electricians. Our concern is just as great as NECA's the IBEW's, and

all the rest. We want competent, trained tradespeople going into the work force.

Technology and work situations are moving so fast that we need educated people, and it is my plea to this committee—do not legislate us out of existence. I can appreciate New York's and Pennsylvania's concerns, but as for the other 48 States, could they not possibly deal with that on a State level?

Thank you.

[The prepared statement of Mr. Benjamin follows:]

PREPARED STATEMENT OF HOWARD E. BENJAMIN

I am an electrician working for Riteway Electric Company, Inc. in Bellingham, Washington, which is a member of the Independent Electrical Contractors, Inc. whose national office is located in Alexandria, Virginia.

My involvement with IEC began in 1991 as a Third Year Apprenticeship Instructor in the apprenticeship program of the Northwest Washington Chapter, IEC. IEC in Washington had been training apprentices for several years in a program approved by the Bureau of Apprenticeship and Training of the U. S. Department of Labor. However, this program was not approved and the apprentices were not registered with the Washington State Apprenticeship and Training Council (WSATC or Council). Effectively, they were not apprentices unless they were working on a job that only involved the Federal Government (i.e. post offices, military establishments, etc.). Therefore, most apprentices felt like second class citizens and their employers did not seek to have them registered at all.

In the Fall of 1991, I was approached to serve on the IEC Apprenticeship Committee as an employee representative. I accepted and have been: active participant since. As a Committee, we have contributed many hours drafting and submitting our standards of apprenticeship to the WSATC. I have attended five WSATC quarterly business meetings with IEC in an effort to get our standards approved. Each time our standards would be rejected primarily on the basis of WSATC Rules and Regulations (WAC 296-04-280) which "provides that no on-the-job training programs shall be established or authorized where there is a parallel Apprenticeship program in existence." Specifically, the "parallel" program is the International Brotherhood of Electrical Workers' Joint Apprenticeship and Training Council program. Others of our committee and I have specifically outlined the difficulties with this requirement.

The Council directed us to communicate with Mr. Ernie Bennett, Apprenticeship Coordinator in Mt. Vernon, Washington. He provided a "boiler plate" of what the Council was looking for in our standards. This document emphasized that we "recognize employee organizations, representatives, agents" We are an Open Shop organization and therefore have no such employee organization.

At the April, 1993 Quarterly Business Meeting of the Council, Ms. Nickie Moran, Acting Assistant Director of the Employment Standards, Apprenticeship, and Crime Victims Compensation Division of the Department of Labor and Industries, asked our employer representative, IEC member, Mr. Terry Earnheart, "Is there not an existing employee organization for your program?", on four occasions. Following her questions, I asked if she was implying that I, as an employee, should have to join the Union in order to participate in our apprenticeship program. My question was ignored with no response from any member of the Council. Virtually all of my testimony at these meetings has been handled the same way. I had the impression that since I was not a member of a recognized employee organization, my input had no bearing on the hearing.

At this April, 1993 meeting it was noted that the Council's interpretation of "parallel program" had been altered by the U. S. Ninth Circuit Court of Appeals ruling in the case of Associated Builders and Contractors vs. McDonald.

At the July, 1993 meeting we presented our Apprenticeship Standards again with the "boiler plate" recommendations from Mr. Bennett. We attended the meeting with the understanding that our Standards could be approved if we deleted all reference to "employee representation." That was not our desire, but we were prepared to make these deletions if necessary. The Council still ignored BAT and RCW references to those persons known to represent employee interests," and reemphasized that we had no employee organization represented in our program. Mr. Earnheart submitted the amendments to our Standards, deleting all reference to employees involved in our program. Our Standards were accepted and subsequently approved as an employer program only.

65 percent of the electrical workers in the state of Washington are non-union. After many hurdles and a great deal of delays, they now have an opportunity to obtain State approved Apprenticeship Training. In the entire United States 71 percent of the electrical workers or 383,420 workers are non-union. 85 percent of the nations electrical employers are non-union. I ask you, do not pass this discriminatory legislation against the majority to benefit the political minority.

My personal situation is one of growing up in trade unions. The majority of my extended family are, or have been, union members. I have been a union member and officer in the union most of my working life. 1 have chosen to be non-union for the past ten years, primarily for philosophical reasons. I do not consider myself anti-union, only non-union. Unions have their roll in our society and I can accept that. I do not see them having a roll in my life and career choices.

The experience I have had in fighting a government policy designed to protect the union I left has been very frustrating. If electrical unions and contractors properly serve their members and their employees, they would not need your help in forcing me to join their organizations.

Everyone should have equal access to apprenticeship and training. I will compare the quality of the training I provide to anyone's. I am proud of the work I do. I am not proud of the efforts by Washington State regulators to protect union programs at our expense.

I ask you, senators; do not legislate us out of existence.

Senator WOFFORD. Thank you. We will hear from all of you and then come to questions.

Mr. Joe Dart is president of the Massachusetts Building and Construction Trades Council, from Boston.

Mr. DART. Thank you, Mr. Chairman and members of the committee. As president of the Massachusetts Building Trades Council, I speak on behalf of 80 local unions and an aggregate membership of 60,000 members.

Our members and their families need expeditious enactment of H.R. 1036 as passed by the House of Representatives. I want to address two aspects of the bill that are most critical for our members.

The preemption clause of ERISA has been misinterpreted by some Federal and State courts to strike down State law debt collection rights that our pension, health and welfare funds have heavily relied upon since well before ERISA's enactment in 1974. Contrary to the very purposes of ERISA, the loss of these collection remedies have endangered rather than enhanced the financial security of these benefit funds and threatened the pension and health benefits of thousands of working people and their families.

For over 100 years, the construction workers in Massachusetts have been able to collect unpaid wages from property owners through mechanics' liens.

An alternate arrangement was created for workers on public projects in light of the legal limitations on suing public entities. The alternate scheme required that bonds be posted to protect the wages and benefits of workers employed on public construction projects in Massachusetts. Workers who were not paid for work performed on public projects were protected by the legally required bonds or insurance policies covering those projects.

Approximately 5 years ago, some private property owners and some insurance companies started to argue that ERISA actually limited rather than enhanced the opportunities of fringe benefit funds to collect delinquent contributions. The courts apologized, but accepted the arguments. Our own court of appeals for the First Circuit in Boston held that the Massachusetts mechanics' liens laws were preempted by ERISA.

In addition, at least one Massachusetts superior court has held that the Massachusetts public sector bonding statute is preempted by ERISA if and to the extent that the fund trustees seek to collect delinquent fringe benefit fund contributions due on a public development.

The result is ironic and dangerous—a statute designed to protect workers and employee benefit funds is actually endangering both.

The case of a now deceased laborer, John Knowles, illustrates my point. John died in July of 1991, after a several-month battle with a catastrophic illness. Prior to his death, he worked for a signatory subcontractor at the Gardner Prison job site in Gardner, MA. The Commonwealth of Massachusetts built the prison, and applicable State law required that a payment and performance bond be posted to guarantee, among other things, payment of all fringe benefits due for all work performed on the prison job site.

John Knowles' employer failed to pay fringe benefits due for the work performed by its laborers on the Gardner Prison job site. When the fringe benefit funds discovered the delinquency, the employer was already judgment-proof. Accordingly, the funds took steps to collect the delinquent fringe benefits from the bonding company that ensured the Gardner Prison job site.

Five years ago, the bonding company would not have put up a fight over such a clearly valid claim. But today, ERISA preemption gives bonding companies an excuse for refusing to pay legitimate claims.

Mr. Knowles' benefit funds had to sue the bonding company that posted the payment and performance bond on the prison job site, and the company has raised ERISA preemption as a defense to the lawsuit. The company will succeed in avoiding payment of this legitimate claim through an ERISA preemption loophole unless H.R. 1036 is promptly enacted.

Beyond the loss to the benefit funds is the impact on Mr. Knowles' family. Approximately $5,000 in unpaid fringe benefit contributions is due on account of work performed by John Knowles at the prison job site. Because the contributions were not paid, Mr. Knowles lost his eligibility for health and welfare benefits. Had the contributions been paid, Mr. Knowles would have been fully eligible for all benefits.

Today, Mr. Knowles' widow is responsible for over $100,000 in medical bills on account of John's illness. All of these bills would have been covered by his health and welfare fund if contributions had been made on John's behalf for the time he worked at that job site.

In addition, Mrs. Knowles finds herself ineligible for $10,000 of life insurance benefit provided by the health and welfare fund. Why? Because of the inadequate contributions made for the many hours that her husband worked at that job site. Mrs. Knowles would be eligible for this life insurance benefit if contributions were made on John's behalf for the work he performed on the prison job site.

Even though John's employer was judgment-proof, the bonding company that posted the payment and performance bond for the prison job site was and is financially sound. It could have and would have paid all contributions due on the prison job site but for

broad interpretations of ERISA. Its payment could have and would have saved Mrs. Knowles unnecessary pain and anguish. Its payment could have and would have saved medical providers the extra expense of chasing John's unpaid bills.

Now, only Congress can make the bonding company pay the delinquent contributions that it promised the Commonwealth it would pay.

It is easy to conclude that the health and welfare fund should bend its rules and cover John Knowles. But funds enduring delinquency problems risk the availability of benefits to all participants whenever they cover unfunded claims like John Knowles'.

The blame for the Knowles' tragedy rests with the courts and the bonding and insurance companies that have taken advantage of errant legal interpretation of ERISA's preemption provisions. The bill before you will eliminate this problem and is the only way to eliminate the problem.

The court's interpretation of ERISA will also add to labor unrest and injure the economic recovery. Most construction industry collective bargaining agreements provide the right to strike, or at least withhold labor, in response to unpaid fringe benefit fund contributions. This right was not utilized very often when liens and bonds were available to secure payment of the delinquent contributions. Without that security, unions can be expected to strike earlier and more often if a contractor becomes delinquent in its fringe benefit contributions.

I would also like to comment briefly about the relationship between ERISA preemption and the State prevailing wage laws. A number of courts have held that the State prevailing wage statutes are, at least in some contexts, preempted by ERISA. These holdings are inconsistent with Congress' original intent in enacting ERISA.

Massachusetts has had a prevailing wage law since 1914, and in 1988, the law was tested by a statewide referendum, and almost 60 percent of the voters in the general election voted to keep the prevailing wage law in the Massachusetts statutes. This vote confirmed the fundamental importance of the prevailing wage law to the citizens of Massachusetts.

Since then, courts have started to tell us that ERISA somehow precludes the enforcement of State prevailing wage laws. While we in Massachusetts have not been subjected to such a decision, it is only a matter of time before the virus spreads. Passage of H.R. 1036 will ensure that those States that want to have these laws will be able to continue to have them and enforce them.

In conclusion, prompt enactment of H.R. 1036 is essential to the workers and families of Massachusetts. It is essential to restore to us the means for effectively collecting benefit fund contributions and protecting health and pension benefits earned by our members. It is essential to prevent bonding companies from avoiding payment of legitimate contribution claims on technical ERISA preemption grounds.

It is essential remove Federal preemption as an unintended barrier to workers and their benefit funds, using mechanics' liens to collect earned compensation as long intended by the people of Massachusetts.

It is essential to prevent labor disputes by restoring traditional legal remedies from unintended Federal preemption. And it is essential to stop the Federal courts from misapplying ERISA to deprive the people of Massachusetts of the prevailing wage law that they overwhelmingly voted to retain in 1988.

Thank you.

[The prepared statement of Mr. Dart follows:]

PREPARED STATEMENT OF JOE DART

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before you today. As President of the Massachusetts Building Trades Council, I speak on behalf of 80 local unions and an aggregate of 60,000 union members.

Our members and their families need expeditious enactment of H.R. 1036 as passed by the House of Representatives. We share the views expressed by Bob Georgine, President of the Building and Construction Trades Department of the AFL–CIO, and are pleased to join with him in urging your approval of the measure at the earliest opportunity. Given the bipartisan support for the legislation as reflected in the introduction of an identical bill, S. 1580, by Senators Spector and D'Amato—we see no reason for delay.

want to address two aspects of the bill that are the most critical for our members. But, my support for the legislation as a whole is undiminished by the limited nature of my comments.

I. MECHANICS' LIENS AND BONDING LAWS

The preemption clause, Section 514 of ERISA, has been misinterpreted by some Federal and State courts to strike down State law debt collection rights that our pension, health and welfare funds have heavily relied upon since well-before ERISA's enactment in 1974. Contrary to the very purposes of ERISA, the loss of these collection remedies has endangered, rather than enhanced, the financial security of these benefit funds and threatened the pension and welfare benefits of thousands of working people and their families.

For over one hundred years, construction workers in Massachusetts have been able to collect unpaid wages from property owners through mechanics' liens. Construction workers in almost all other States have had similar rights for somewhat shorter periods of time.

The principal exception to this general rule involved construction workers employed on publicly owned construction projects. An alternate arrangement was created for these men and women in light of the legal limitations on suing public entities. In Massachusetts, the alternate scheme required that bonds be posted to protect the wages and benefits of workers employed on public construction projects. Workers who were not paid for work performed on public projects were protected by the legally required bonds or insurance policies covering those projects. Workers who were not paid for work performed on private developments continued to have a right to "lien" the property on which they worked to the extent of the wages owed.

Over the past fifty years, an increasingly large component of construction workers' wages has consisted of fringe benefits. Our jointly trusteed funds, sanctioned by federal law, have been providing invaluable pension, health and welfare, annuity and apprenticeship and training benefits for many years. The cost of these benefits is paid by the employer over and above the wages it pays to the worker. Today, it is typical to find employers paying $10.00 per hour in fringe benefit fund contributions; these contributions are in addition to direct wages.

When ERISA was enacted, our fringe benefit funds were free to collect unpaid fringe benefits by, among other things, placing mechanics' liens on private property and/or pursuing statutory bonds in place on public developments. Most funds continued to do so for several years after ERISA became law.

Approximately five years ago, some private property owners and some insurance companies started to argue that ERISA actually limited rather than enhanced the opportunities of fringe benefit funds to collect delinquent contributions. The Courts apologized, but accepted the arguments. Our own Court of Appeals for the First Circuit in Boston held that the Massachusetts Mechanics' Liens laws were preempted by ERISA. At the same time, the Court observed that, "the lien law is a help, not a hindrance, to ERISA regulated plans." It went on to say, however, that, "benefit is not the relevant" legal "test" for ERISA preemption analysis.

At least one Massachusetts Superior Court has held that Massachusetts General Law, Chapter 149, Section 29, the public sector bonding statute, is preempted by ERISA if and to the extent that fund trustees seek to collect delinquent fringe benefit fund contributions due on a public development.

The result is ironic and dangerous: a statute designed to protect workers and employee benefit funds is actually endangering both. Not only is the financial integrity of fringe benefit funds threatened by the Courts' interpretation of ERISA Section 514(d), but working people are suffering financial hardship through no fault of their own. Delinquencies to fringe benefit funds have become a serious problem for some funds. So many contractors are unable to pay the required contributions that the financial wherewithal of some funds and the benefits available to all participants of those funds are put at risk.

Those funds that have experienced or are experiencing financial adversity because of delinquencies often have no choice but to strictly construe eligibility requirements. One statewide fund in Massachusetts will not cover individual workers unless it has received actual money contributions for a minimum number of hours worked by the worker. Even workers who performed the work, but for whom the contractor made no contributions, are not covered. This policy, while perfectly justifiable from the standpoint of the participants as a whole, can cause unfair results for individual participants.

The case of a now-deceased laborer, John Knowles, illustrates my point. John died in July, 1991 after a several-month battle with a catastrophic illness. Prior to his death, he worked for a signatory subcontractor at the Gardner Prison jobsite in Gardner, Massachusetts. The Commonwealth of Massachusetts built the prison and applicable State law required that a payment and performance bond be posted to guarantee, among other things, payment of all fringe benefits due for all work performed on the prison jobsite.

John Knowles' employer failed to pay fringe benefits due for the work performed by its laborers on the Gardner Prison jobsite. When the fringe benefit funds discovered the delinquency, the employer was already judgment-proof. Accordingly,the funds served the statutory notices required by Chapter 149, Section 29 and took steps to collect the delinquent fringe benefits from the bonding company that ensured the Gardner Prison jobsite.

Five years ago, the bonding company would not have put up a fight over such a claim. But today, ERISA preemption gives bonding companies an excuse for refusing to pay legitimate claims.

Mr. Knowles' benefit funds had to sue the bonding company that posted the payment and performance bond on the Gardner Prison jobsite. And, the company has raised ERISA preemption as a defense to the lawsuit. The company will succeed in avoiding payment of this legitimate claim through an ERISA preemption loophole unless H.R. 1036 is promptly enacted.

Beyond the loss to the benefit funds is the impact on Mr. Knowles' family. Approximately $5,000.00 in unpaid fringe benefit contributions is due on account of work performed by John Knowles at the Gardner Prison jobsite. Because the contributions were not paid, Mr. Knowles lost his eligibility for Health and Welfare benefits. Had the contributions been paid, Mr. Knowles would have been fully eligible for all benefits.

Today, Mr. Knowles' widow is responsible for over $100,000.00 in medical bills on account of John's illness. All of these bills would have been covered by his Health and Welfare Fund if contributions had been made on John's behalf for the time he worked at the Gardner Prison jobsite.

In addition, Mrs. Knowles finds herself ineligible for the $10,000.00 life insurance benefit provided by the Health and Welfare Fund for workers who die while in covered employment. Why?. Because of the inadequate contributions made for the many hours that her husband worked at the Gardner Prison jobsite. Mrs. Knowles would be eligible for this life insurance benefit if contributions were made on John's behalf for the work he performed on the Gardner Prison jobsite.

Even though John's employer was judgment proof, the bonding company that posted the payment and performance bond for the Gardner Prison jobsite was and is financially sound. It could have—and would have—paid all contributions due on the Gardner Prison jobsite but for broad interpretations of Section 514(d) of ERISA. Its payment could have—and would have—saved Mrs. Knowles unnecessary pain and anguish. Its payment could have—and would have—saved medical providers the extra expense of chasing John's unpaid bills. Now, only Congress can make the bonding company pay the delinquent contributions that it promised the Commonwealth it would pay.

There are hundreds—perhaps thousands—of John Knowles in America today. Passage is needed to prevent such tragedies.

It's easy to conclude that the Health and Welfare Fund should bend its rules and cover John Knowles. But Funds enduring delinquency problems risk the availability of benefits to all participants whenever they cover unfunded claims like John Knowles'.

The blame for the Knowles' tragedy rests with the courts and the bonding and insurance companies that have taken advantage of errant legal interpretations of section 514(d). The bill before you will eliminate the problem, and is the only way to eliminate the problem.

The Court's interpretation of ERISA will also add to labor unrest and injure the economic recovery. Most construction industry collective bargaining agreements provide the right to strike or at least work in response to unpaid fringe benefit fund contributions. This right was not utilized very often when liens and bonds were available to secure payment of the delinquent contributions. Without that security, unions can be expected to strike earlier and more often if a contractor becomes delinquent in its fringe benefit fund contributions. This will, in turn, interrupt construction work and increase economic dislocation. While the NLRA was and is designed to encourage labor peace, ERISA 514(d) is being interpreted to discourage labor peace. The inconsistency must end and labor peace must take precedence.

II. PREVAILING WAGE LAWS

I would also like to comment briefly about the relationship between ERISA preemption and State prevailing wage laws. At least two United States Courts of Appeals have held that State prevailing wage statutes are, at least In some contexts, preempted by ERISA. These holdings are inconsistent with Congress' original intent in enacting ERISA and have the same ironic consequences I described in my earlier remarks.

The Massachusetts Prevailing Wage Statute was passed in 1914. A statewide referendum ratified the continuation of the law in 1988. Almost sixty percent of the voters in the 1988 General Election voted to keep the Prevailing Wage Law in the Massachusetts statutes. This vote confirmed the fundamental importance of the Prevailing Wage Law to the citizens of Massachusetts.

Since then, Courts have started to tell us that ERISA somehow precludes the enforcement of State prevailing wage laws. While we in Massachusetts have not been subjected to such a decision, it is only a matter of time before the virus spreads. Most states have prevailing wage laws. The Federal Government has such a law. Passage of H.R. 1036 will ensure that those States that want to have these laws will be able to continue to have them and to enforce them.

III. CONCLUSION

In conclusion, prompt enactment of H.R. 1036 is essential to the workers and families of Massachusetts. It is essential to restore to us the means for effectively collecting benefit fund contributions and protecting the pension, health and welfare benefits earned by our members. It is essential to prevent bonding companies from avoiding payment of legitimate contribution claims on technical ERISA preemption grounds. It is essential to remove federal preemption as an unintended barrier to workers and their benefit funds using mechanics' liens to collect earned compensation as long-intended by the people of Massachusetts. It is essential to prevent labor disputes by restoring traditional legal remedies from unintended federal preemption. And, it is essential to stop the Federal courts from misapplying ERISA to deprive the people of Massachusetts of the Prevailing Wage Law that they overwhelmingly voted to retain in 1988. Thank you very much.

Senator WOFFORD. Thank you. The chairman of this committee, I might say, happens to come from Massachusetts.

Senator Kennedy.

The CHAIRMAN. I know we want to move along and hear the other witnesses, but I want to thank Mr. Dart—and maybe these circumstances affected our other witnesses—but he took a long train ride down here in inclement weather, and then they published in the newspaper that nonessential services would be closed down, which included the U.S. Senate. They left the national press open, but closed us down here. Then he took the train all the way back, and I think this is about the third time he has been down.

Senator WOFFORD. That is the second medal awarded today.

The CHAIRMAN. I will put my full statement in the record, but let me just say very briefly that the courts' decisions in these areas just defy any kind of logic or understanding of the history. Prevailing wage apprenticeship programs, the lien issues, all were out there at the time when ERISA was considered. There was absolutely no consideration that any of these would be wrapped in ERISA and be permitted to be struck down by the courts—none. And these were not new items that were added back into the whole dialogue. Prevailing wages, go back to the turn of the century in some States.

So it is completely unwarranted and unjustified. And I think, as Mr. Dart concluded in his own statement, it is very clear what the Congress intended in terms of pensions and in terms of other health and welfare benefit issues. But certainly, when you are talking about State standards for apprenticeship programs, the applicability of State mechanics' liens and the ability of States to require payment prevailing wages for State projects, the courts are just way out of order.

So as has been pointed out, this is an area where action is absolutely called for and is absolutely essential. I asked my staff to prepare a listing of some of the States where there are currently causes of action that are working their way through the system. The list shows that the preemption clause is just an axe that is being held over the necks of working men and women in our society. So this is essential, it is essential that we do it now, and we want to give you the assurance that we will move it as fast as we possibly can.

And I want to thank Senator Wofford for chairing the hearing. He comes to this with a unique background in terms of many of these kinds of programs in his own State. He has a very keen awareness. He has spoken to me a number of times about the importance of taking action in this area, and I think we are very fortunate to have him out in front of this effort, and we are going to cooperate in every possible way to make sure we get some action.

I thank the Senator.

Senator WOFFORD. Thank you, Mr. Chairman.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

Today the committee considers the degree to which the Federal Employment Retirement Income Security Act—ERISA—pre-empts longstanding State protections for workers, such as prevailing wage laws, training standards, and a variety of other benefits.

When Congress enacted ERISA in 1974, the intent was to apply a single national standard to protect workers' health and welfare benefits. To do so, the Federal law pre-empted State laws "insofar as they relate to" employee benefit plans governed by ERISA.

In recent years, however, the courts have gone far beyond the original intent of ERISA and vastly extended the reach of the preemption provision. A decision of the Federal district court in Pennsylvania in 1993 invalidated the State's entire prevailing wage statute. The Court of Appeals for the Second Circuit ruled that New York's public works prevailing wage law was preempted to the

extent that it included pension, health, and welfare benefits in the calculation of the prevailing wage.

Thirty-one States have prevailing wage statutes. Their purpose is to ensure that contractors compete fairly for public works projects—not on the basis of who can pay the lowest wages, but on the basis of the efficiency and quality of the work. The Massachusetts prevailing wage law has been in force since 1914. In 1988, among the referendum measures on the ballot was a proposal to repeal the law—and the voters rejected it by a substantial margin. But there is still concern that the courts still preempted it. In fact, the courts have already involved the pre-emption doctrine to nullify a related Massachusetts law for the protection of workers—the availability of mechanics' liens to guarantee that construction workers are paid for their labor on certain projects.

Finally, a number of decisions have preempted State standards for apprenticeship programs. The Fitzgerald Act established minimum standards for such programs and there was no intention that ERISA should pre-empt them.

As the Senate has recognized recently through our votes on the School-to-Work bill and our adoption of skills standards legislation, many apprenticeship programs are models for training youth and establishing high standards. These programs should not be disrupted by ERISA, which has only a minor relationship to programs.

These are important issues in the modern workplace, and the Senate must soon address them. I commend our witnesses for sharing their experiences with us, and I look forward to their testimony.

Senator WOFFORD. I will begin with one question to Mr. Lalley and anyone else who wants to comment on it. Could you spell out just a little more for us how, if we do not do anything, apprenticeship programs are going to be affected? What would the lack of State prevailing wage laws do to the training of apprentices? Mr. Bradley may certainly comment, too.

Mr. BRADLEY. I think what we would find is a tremendously diminished ability to train apprentices effectively. Right now, in the State of Pennsylvania, with our partners, the IBEW, we have effective training programs across the State for electrical workers, as do many of the other trades. And we are training 5 years, 8,000 hours of training, up to 10,000 in some cases, with over 800 hours of classroom training related to that.

Our ability to work these people, as you heard in Mr. Lalley's testimony, at a reduced rate because it is a bona fide State-approved program, would be annihilated if this broadened preemption provision were allowed. And effectively, I think you would see a diminished amount of training, a tremendous disinterest in the trades, and our inability to attract competent, qualified people to come and be trained under these qualified programs.

Mr. LALLEY. In addition to what Mr. Bradley said, I would like to add to that that apprentice participation does make it a competitive area for contractors so that we can compete with some of our other nonunion competition. This used of trained apprentices allows us to compete in a better fashion.

Senator WOFFORD. Mr. Dart.

Mr. DART. Mr. Chairman, on behalf of labor, I wanted to point out that the apprentice contributions that are negotiated across the table between ourselves and management are our investment in the future of our industry. We feel very strongly that a portion of money that we could normally get maybe in wages or other forms of benefits should be set aside and used to train new people coming in to our industry, and particularly today, when we find ourselves as a country in severe competition with other countries and different regions within our own borders, it is extremely important that we have that availability to train our own people.

Senator WOFFORD. Mr. Benjamin.

Mr. BENJAMIN. As you said, Mr. Dart, it is our trade, and I guess that is what we lose sight of. I am not anti-union. I choose to be nonunion. And for me, growing up in the trades, they have changed dramatically for me personally, and it is a choice I have made.

Senator Kennedy, yes, there are and have been apprenticeship programs out there for years. Our open shop apprenticeship program has not been, and the only way it has been allowed in Washington State is based on the current Ninth Circuit Court of Appeals ruling.

This interpretation of ERISA allowed our program to be recognized in Washington State by court order. What I am looking for for the balance here—and I can really appreciate the concerns in Pennsylvania and, from what I understand, New York, on bonding companies abusing these narrow court interpretations on ERISA.

Now, I am not an attorney, and I might get myself in trouble with my colleague here, but I am a worker. I am an electrician by trade. That is what I do. To me, common sense says it would be more appropriate to tighten up these areas in ERISA that would not allow the bonding companies to abuse. On a catastrophic death in a family to be punished—no—you do not have to be union, you do not have to be nonunion, you do not have to be anything to realize that that is wrong. And that is an area that needs to be addressed for all trades, for any worker in America.

I personally believe it would be more appropriate to address that issue because currently, the amendments coming in on this ERISA bill will throw us wide open out on the West Coast. In my personal opinion from being involved in it, there is better than an 80 percent chance that our apprenticeship program will decertified, and then the only formal training recognized in Washington State would be through the union apprenticeship programs.

My personal perspective is that I have been through union history, I know the way the workers have suffered, the gains that have been made by the unions—and I acknowledge unions as necessary in our society. But also, gentlemen, what if the day comes when we are all union? Look at our signatory and nonsignatory shops as part of the checks and balances in American society.

Union programs will be here, and I suspect they will always be here. The nonunion programs will be here, and all we are asking is for an equal opportunity to train our people effectively, competently, and to make them good tradespeople.

Senator WOFFORD. I know the present regulations of the Bureau of Apprenticeship and Training provide that an aggrieved party in a State could petition to complain against the State council's action

and seek derecognition. In terms of your problems in Washington, have you ever sought to invoke that process?

Mr. BENJAMIN. Yes, and it was ignored. The State felt that they were not subject to BAT. They totally ignored BAT interpretations to that council. And even when the Ninth Circuit Court of Appeals first ruled in the ABC v. McDonald case, Washington State specifically ignored that ruling until they were named specifically on appeal.

Senator WOFFORD. You approach this as if Pennsylvania and New York or Massachusetts are the exceptions. Is it possible that Washington is the exception?

Mr. BENJAMIN. No. California had these difficulties. I guess what I am trying to explain to you, Senator, is that I am right up on the Canadian border, Whatcom County, in Washington State, and being here is quite an experience for me. My attire is out of respect for this body. I am very uncomfortable in a suit and tie; I want to tell you that right now.

Senator WOFFORD. I am, too.

Mr. BENJAMIN. But a lot of impressions I have of what I have tried to learn as I have become involved in this, my primary concern out there is why the changes in this ERISA bill right now, the way they are presented, I think we are going to end up with a backwash. The courts have gone one way, and that is what we are getting; we are getting a big groundswell in one direction that is impacting a lot of programs negatively.

The proposals and the amendments coming up—I guess what I am saying is that I see a groundswell going the other way. And possibly, since this is in you gentlemen's committee, maybe we could look at it a little more objectively and try to even it out. Let us identify what the specific problem is and try to deal with it equitably for the Nation as a whole—not for Pennsylvania, not for Washington, not for New York, but for America and trades workers across America.

Senator WOFFORD. Well, I assure you I am going to give your written testimony special attention because you are outnumbered so far on this panel. I will try to even that up by reading it with real care.

Senator Kennedy.

The CHAIRMAN. Let me ask Mr. Dart, is part of the problem in this situation that without the bonding that you get with these contractors, those who do not comply, fall behind in terms of their responsibilities, and then leave the jurisdiction; while others that meet their responsibilities, because they are conforming and meeting their responsibilities, their costs go up, and you have got an unfair kind of situation of competition, where the burden is being taken out on the backs of the workers. Is this part of the problem?

Mr. DART. Very definitely, Senator. As you know, in the very glaring health care debate that is taking place now, it is clear that those who provide health care are actually providing it not only for those whom they are paying for, but also for those employers who choose not to provide health care. In Massachusetts, we are taxed an additional 10 percent on our premiums to pay for employers who do not provide health care. And when employers do not pay, even under collective bargaining, and do not live up to their re-

sponsibility and provide those contributions, that same effect takes place on that health fund; there is an additional cost that has to be borne by all the participants, and very often the choice comes down to do you have to then tax the fair contractor, the responsible employer, additional contributions to maintain a level of benefits for the members, or do the members forego any future improvement in benefits. Or, do we simply reduce benefits?

It also has an effect on the individual participants in those funds, and that is our main problem, I think.

The CHAIRMAN. Finally, one of the holdings, as I understand it—for example, on severance pay, if you give it in a block, it is not considered to relate to a plan of benefits; if you have severance pay that is paid out of two or three different time periods, it is interpreted as a plan related to benefits. Trying to draw those kinds of nuances so far exceeds where any congressional intent goes, and works such a disadvantage in terms of workers, who are having a tough time as it is in any event, that it just defies, I think, logic and understanding.

I appreciate it. Thank you very much, Mr. Chairman.

Senator WOFFORD. I want to thank all four of you, and we will review your testimony with great interest.

Mr. Benjamin?

Mr. BENJAMIN. If I may say, just briefly, Senator Kennedy, you just made me realize something that is part of my confusion. For the record, in Washington State—and this is where I have been confused—let us say the electrician prevailing wage is $20 an hour, and the benefit package is $5 an hour, just for even numbers. In Washington State, prevailing wage is determined by contacting the IBEW, asking them what their wage schedule is and what their benefit package is. That is prevailing wage for the State of Washington.

Now, in Washington, in prevailing wage jobs, if a contractor shows he is putting $4 an hour into a benefit program for his employees, he will pay $21. In other words, the way Washington State looks at it is $25 an hour in wages and benefit will go to those employees—or more. What is established in Washington State is that these are the minimums that will be paid. And some contractors do not offer any benefits, so they will pay $25 an hour wages.

Senator WOFFORD. I hope you did not fly all the way from Washington for our February 11 hearing.

Mr. BENJAMIN. I was here.

Senator WOFFORD. You did.

Mr. BENJAMIN. Even Metro shut down, so I was not able to sightsee.

But I want to thank you gentlemen for this opportunity. I brought my wife with me this time, and we are taking a couple of extra days to take in your wonderful city.

Senator WOFFORD. Good.

Mr. BRADLEY. Senator, if I may, real quickly, with respect to Pennsylvania on that same issue, if the current ruling in Federal court stands, then we will have no prevailing wage at all.

Senator WOFFORD. That, I understand.

Thank you very much.

The next panel includes Commissioner John Hudacs, Jim Ray, Mark Thierman, and Leo Garcia.

We will start with New York State's Labor Commissioner, Don Hudacs. I was once your counterpart.

STATEMENTS OF JOHN HUDACS, NEW YORK STATE COMMISSIONER OF LABOR, ALBANY, NY, ON BEHALF OF NATIONAL ASSOCIATION OF GOVERNMENTAL LABOR OFFICIALS; JIM RAY, ESQ., ON BEHALF OF ROBERT A. GEORGINE, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, WASHINGTON, DC; MARK R. THIERMAN, ESQ., ON BEHALF OF ASSOCIATED BUILDERS AND CONTRACTORS, SAN FRANCISCO, CA; AND LEO GARCIA, ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO, CA

Mr. HUDACS. Thank you, Senator.

I as born and raised in Scranton, PA, so if you want use that as a guide for where to start, working in New York State, and my wife is from Gloucester, MA, so I can be moved anywhere you wish on the panel.

It is indeed a pleasure to be here. I am commissioner of the New York State Department of Labor, and I am here today on behalf of New York State, but also on behalf of the National Association of Governmental Labor Officials, an organization called NAGLO, which is comprised of the commissioners of the State and Territorial departments of labor and industrial relations. And the majority of its members have been significantly and adversely affected by the series of Federal court decisions regarding ERISA preemption of State prevailing wage and apprenticeship training laws.

ERISA was enacted to safeguard workers' welfare and pension funds and to protect workers from failure to pay benefits from those funds, a goal that I and all of us whole-heartedly support. The idea was to prevent States from setting standards or requirements that were inconsistent with ERISA's financial management and coverage provisions, including vesting, funding, and participation requirements.

But in several instances, the courts' interpretation of the intent of ERISA is being used to harm the very workers that Congress intended to protect. Overly broad judicial readings of ERISA's preemption clauses have produced decisions that weaken basic worker protections, such as the prevailing wages laws and apprenticeship programs and standards.

Although we disagree with the reasoning of the adverse court decisions, further litigation will not solve the problem. Judge after judge has made it clear that if we want to correct their interpretation of congressional intent, our only recourse is to go to Congress to amend the law, to clarify the language within ERISA. And Senate 1580 provides the States with the relief we need in the prevailing wage and apprenticeship areas.

Prevailing wage laws serve several purposes. First, they guarantee that workers performing public work do not have to accept wages below the rate paid to workers on private projects in the same locality.

Second, they help ensure that the public work projects are built to high standards by a skilled and well-trained labor force.

Litigation has invalidated parts of the States' prevailing wage law, significantly weakening the States' ability to enforce wage standards on State and local funded public work projects. This hinders the States' ability to protect workers from unscrupulous construction employers or to maintain a competitive but fair bidding process that is part and parcel of any public works project.

Thirty-one States have enacted prevailing wage laws with respect to employment on construction and other projects which are funded by State or local governments. Twenty-four of these States' prevailing wage laws include the cost of fringe benefits in determining prevailing wages. The States which include fringe benefits do so in recognition of the tremendous change in employee compensation in the last 50 years.

ERISA preempts State laws that "relate to" an ERISA plan. The interpretation of these two simple words has been used to extend ERISA's preemptive reach into areas of traditional State regulation and well beyond congressional intent.

For example, New York State's prevailing wage law was dealt a harsh blow in the 1989 case of General Electric v. New York Department of Labor. In that case, the Second Circuit Court of Appeals ruled that the way in which we had been applying New York's prevailing wage laws to noncash fringe benefits, the supplements, so "related to" ERISA benefits as to preempt us under ERISA from applying the law as we had been doing prior to that case.

We have since struggled to modify our regulatory approach consistent with the nuances of the court's opinion while still trying to preserve the integrity of the prevailing wage law, a law which was first enacted in our State in 1897 and, since 1956, contained a provision requiring the payment of prevailing supplements in addition to wages.

I should also note that prevailing wage is also contained within the New York State Constitution.

The preemption of prevailing wages jeopardizes traditional State authority. If there were a strict interpretation of the GE decision, contractors who ignored the fringe benefit section of the statute could enjoy a substantial advantage in the bidding process over contractors whose fringe benefits meet the locally prevailing standards.

In addition to undermining the enforcement of State prevailing wage laws, the ERISA preemption provision has weakened our enforcement of the State apprenticeship programs. As was indicated earlier, the skilled labor in this country has long been recognized as one of our greatest and most valuable resources. Apprenticeship programs are a time-tested, proven model for meeting this increasing need for skilled workers.

The Federal Fitzgerald Act deals with the promotion of standards of apprenticeship, recognizing the important role that States have historically played in regulating apprenticeship training programs. It specifically directs the Secretary of Labor to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. Twenty-seven States, Puerto Rico, and

the District of Columbia have federally-recognized State apprenticeship agencies. Currently, there are thousands of State-sanctioned apprenticeship programs which have resulted in the training of over 250,000 apprentices nationwide, many of which are women and minorities.

The States take their apprenticeship training responsibilities seriously. We are continuously monitoring, evaluating, and certifying apprenticeship programs. We also carefully regulate such programs.

Unfortunately, a number of court decisions, including the Eighth and Ninth Circuit Courts of Appeal which were referenced earlier, have held that ERISA preempts such traditional State regulations because, again, they "relate to," albeit tenuously, the plans and programs covered by ERISA.

This has occurred despite the fact that it seems clear that ERISA's regulation of apprenticeship training programs was intended to reach only as far as the program's financial stability and programmatic availability, and not to the training content or the way in which States choose to use apprentices on public work projects.

The damage caused by the ERISA preemption cases is far-reaching. States have been placed on the defensive in trying to enforce worker protection laws. Unfortunately, ERISA preemption challenges to labor-related laws have spawned a legal cottage industry.

Often, persons or entities that are trying to avoid State enforcement or sanctions do so by filing an ERISA preemption lawsuit, and instead of developing new and better methods of enforcement, States have been forced to spend time defending themselves in lawsuits, writing laws and regulations to avoid ERISA lawsuits, and avoiding important initiatives because of a desire to avoid the risk of more litigation.

Congressional action is necessary to stop the endless legal debate on this ERISA preemption issue in the labor arena, and the authority to set prevailing wage standards for State and local public work projects and to prescribe the standards for apprenticeship and training programs arises from the States' sovereign powers to safeguard the public treasury, protect the public, and preserve their rights to contract in the marketplace.

S. 1580 if enacted will allow States to resume the full enforcement of their prevailing wage laws and to carry on their apprenticeship activities free from ERISA challenge.

I want to thank you again, Chairman Wofford, and members of the committee for giving me the opportunity to speak on a subject of tremendous concern to the State departments of labor. New York State and NAGLO have been in the past endorsing the legislation proposed to rectify this situation, and we continue to do so today in urging passage of S. 1580.

Thank you.

Senator WOFFORD. Thank you.

[The prepared statement of Mr. Hudacs follows:]

PREPARED STATEMENT OF JOHN HUDCAS

Good Morning Chairman Wofford and members of the committee. I am John Hudacs, Commissioner of the New York State Department of Labor. I am here

today, on behalf of the State of New York and and on behalf of the NAGLO, the National Association of Governmental Labor Officials.

NAGLO is comprised of the chiefs of the state and territorial Departments of Labor and Industrial Relations, and the majority of its membership have been significantly and adversely affected by a series of federal court decisions regarding ERISA preemption of state prevailing wage and apprenticeship training laws.

I am honored to be given this opportunity to provide input into the very crucial decisions that must be made by the United States Congress in regard to the Employee Retirement Income Security Act (ERISA) and particularly the issue of ERISA preemption and offer this testimony in support of S. 1580. I am pleased that the House of Representatives acted favorably with the passage of H.R. 1036 by a vote of 276–150. The House bill also amends ERISA to remove certain state laws from ERISA's broad preemption provision.

ERISA was enacted to safeguard workers' welfare and pension funds and protect workers from failures to pay benefits from those funds a goal I wholeheartedly support. However, in several instances the courts interpretation of the intent of ERISA is being used to harm the workers that Congress intended to protect. Over broad judicial readings of ERISA's preemption clause have produced decisions that weaken basic worker protections, such as state prevailing wage laws and apprenticeship programs and standards. Although we disagree with the reasoning in the adverse court decisions, further litigation will not solve the problem only Congress can by enacting clarifying language within ERISA. Judge after judge has made it clear that if we wish to correct their interpretation of Congressional intent, our only recourse is for Congress to amend the law. S. 1580 provides the states most of the relief we need in the prevailing wage and apprenticeship areas.

Prevailing wage laws serve several purposes. First, they guarantee that workers performing public work do not have to accept wages below the rate paid to workers on private worksites in the same locality. Second, they help ensure that public work projects are built to high standards by a highly skilled and well trained labor force. And, they also protect the workforce of our local economies by providing a level playing field so that out—of-state or other non-local contractors do not have an unfair advantage because of lower labor costs.

Litigation has invalidated parts of the states prevailing wage law, which has weakened the states' efforts to enforce wage standards on state and local public work projects. This hinders the states' ability to protect workers from unscrupulous construction employers or to maintain a competitive but fair bidding process that is part and parcel of my public works project.

Thirty-one States have enacted prevailing wage laws with respect to employment on construction and other projects funded by state or local government. Twenty-four of these states' prevailing wage laws include the costs of hinge benefits in determining prevailing wages. The states which include hinge benefits do so partly in recognition of the tremendous change in employee compensation in the last 50 years.

ERISA preempts state laws that "relate to" any ERISA plan. The interpretation of those two simple words has been used to extend ERISA's preemptive reach well beyond what Congress intended into areas of traditional state regulation. For example, New York State's prevailing wage law was dealt a harsh blow in the 1989 case of General Electric v. New York Department of Labor. In that case, the Second Circuit Court of Appeals ruled that the way in which we had been applying New York's prevailing wage law to non-cash fringe benefits so "related to" ERISA plans as to preempt us under ERISA from applying the law as we had been doing prior to the case.

We have since struggled to modify our regulatory approach consistent with the nuances of the court's opinion while still preserving the integrity of the prevailing wage law a law which has contained a provision since 1956 requiring the payment of prevailing supplements in addition to wages.

The preemption of prevailing wage laws would jeopardize traditional state authority. In New York, for example, if there were a strict interpretation of the GE decision, contractors who ignored the fringe benefit section of the statute could enjoy a substantial advantage in the bidding process over contractors whose fringe benefits met locally prevailing standards. As a result, non local contractors whose wages and benefits do not meet New York standards will be able to underbid local contractors. This could result in higher local unemployment. It would also be a disadvantage to union contractors who pay fringe benefits pursuant to their collective bargaining agreements. The effect of the GE case and similar decisions could be to allow certain employers on public works contracts to pay employees a total compensation package well below the prevailing wage rate.

In addition to undermining the enforcement of state prevailing wage laws, ERISA's preemption provision has also weakened the enforcement of state apprenticeship and other training programs.

Skilled labor has long been recognized as one of our nation's greatest and most valuable resources. Today, as we strive to compete in a global marketplace, our need for a skilled workforce is greater than ever. Apprenticeship programs are a timetested, proven success model for meeting this increasing need for skilled workers.

The federal Fitzgerald Act, which deals with the promotion of labor standards of apprenticeship, recognizes the important role states have historically played in regulating apprenticeship training programs and specifically directs the Secretary of Labor to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. Twenty-seven states (including New York), Puerto Rico and the District of Columbia have federally recognized state apprenticeship agencies. The remaining twenty-three states regulate apprenticeship to a lesser extent. Currently, there are thousands of state sanctioned apprenticeship programs which have resulted in the training of over 250,000 apprentices nationwide, many of whom are women and minorities.

The states take their apprenticeship training responsibilities seriously. We are continuously monitoring, evaluating, and certifying apprenticeship programs. We also carefully regulate such programs. For example, many states have exercised their traditional regulatory powers over occupational training by prescribing fixed ratios of apprentices to journeymen on public work projects. Such ratios are simply occupational training requirements enacted to protect the safety of both the workers and the public.

Unfortunately, a number of courts, including the Eighth and Ninth Circuit Court's of Appeal have held that ERISA preempts such traditional state regulations because they "relate", albeit tenuously, to plans and programs covered by ERISA. This has occurred despite the fact that it seems clear that ERISA's regulation of apprenticeship training programs was intended to reach only as far as the program's financial stability and programmatic availability, and not to the training content or the way in which states choose to use apprentices on public work projects.

The damage caused by the ERISA preemption cases is far reaching. States have been placed on the defensive in trying to enforce worker protection laws. Often, persons or entities that are trying to avoid state enforcement or sanctions do so by filing an ERISA preemption lawsuit. Instead of developing new and better methods of enforcement, states have been forced to spend time defending themselves in lawsuits, writing laws and regulations to avoid lawsuits and avoiding important initiatives because of a desire to avoid the risk of more litigation ERISA preemption challenges to labor-related laws unfortunately have spawned a legal cottage industry.

It is dear that Congressional action is necessary to stop the endless legal debate on the ERISA preemption issue in the labor arena. Congress must act in order to safeguard the states' traditional enforcement powers. The authority to set prevailing wage standards for state and local public work projects and prescribe standards for apprenticeship and training programs arises from the states' sovereign powers to safeguard the public treasury, protect the public, and preserve their rights to contract in the marketplace. Without the ability to continue our presence in the prevailing wage and apprenticeship arenas, the states will become unwilling parties to the exploitation of workers and the endangerment of our citizens. Neither ERISA nor any other federal law or program can fill this gap.

Enactment of S. 1580 will allow states to resume full enforcement of their prevailing wage laws and carry on the apprenticeship activities free from ERISA challenge.

In closing, I would like to again thank you, Chairman Wofford and members of this Committee for giving me the opportunity to speak on a subject of tremendous concern to State Departments of Labor. New York State and NAGLO have in the past endorsed proposed legislation to rectify this situation, and continue to do so today in the urging of passage of S. 1580. Thank you.

Senator WOFFORD. Jim Ray is an attorney representing the Building and Construction Trades Department, AFL-CIO.

Mr. RAY. Thank you, Mr. Chairman. I do have the privilege of appearing before you today on behalf of Robert Georgine, president of the Building Trades Department, to express strong support for S. 1580 and H.R. 1036 as passed by the House. Bob wanted very much to address you on the importance of this legislation to workers and their families, but unfortunately, a family illness has kept

him away. He asked me to extend to you his apologies and his hearty thanks for your support.

I am also, happily, accompanied today by Jack Curran, who is the chairman of the Building Trades Legislative Task Force, Mr. Chairman.

We are grateful to you, Mr. Chairman, for your efforts on behalf of this legislation, legislation that is so important to the people of Pennsylvania. We are also grateful to subcommittee chairman Metzenbaum and to full committee chairman Kennedy for their invaluable assistance in advancing this legislation. And we are thankful to Senator Specter and Senator D'Amato for sponsoring S. 1580, which is essentially identical to the House-passed bill. Their support reflects the bipartisan nature of this legislation and its importance to the States.

All 50 States have a stake in this legislation. Every State has at least one law that would be preserved or restored from unintended Federal preemption by this legislation. This legislation would clarify that ERISA does not preempt three narrow types of State laws. This statutory clarification is necessary because of a series of recent court decisions which have misapplied ERISA's preemption provisions far beyond their intended scope.

Mr. Chairman, if I may summarize some of the highlights of Bob's testimony. First, this legislation would not require any State to enact or retain a prevailing wage law, an apprenticeship standards law, a mechanics' lien law, or any other law. The bill would merely remove ERISA preemption as an unintended Federal barrier to States voluntarily enacting and retaining such laws. There is no Federal interest in preventing the States from exercising their traditional powers in the narrow areas covered by this bill. This bill does not relate to the Federal Davis-Bacon Act, but rather relates only to State laws.

Second, the bill does not require employers to establish an employee pension or health plan. As a result of the bipartisan compromises made during House consideration of the measure, the bill does not permit prevailing wage laws to be used to mandate that employers establish or maintain benefit plans, or offer particular benefits. This is accomplished by requiring that employers be permitted to substitute cash for benefits determined by the State to be prevailing in the community.

Third, more than 30 States have enacted prevailing wage laws which require employers who successfully bid for public works project to pay their workers on these projects not less than the dollar value of the wages and benefits determined by the State to be prevailing in the community. Although the provisions of these laws vary from State to State, the purposes of State prevailing wage laws generally include: 1) protecting local wage standards from being undermined by public projects; 2) equalizing competition among all contractors bidding on public works; and 3) maintaining quality work standards.

States have long sought to protect community standards from being undermined by public works. Indeed, the first State prevailing wage law enacted in 1891 was enacted by Kansas, Senator Kassebaum's State. New York's law dates back to 1894. The continuing vitality of these laws is demonstrate by the 1988 referen-

dum in which the people of Massachusetts overwhelmingly voted to retain that State's prevailing wage law.

Originally, only cash wages were covered by these State laws. However, employee benefits, like pensions and health insurance and life insurance, have become a more important aspect of employee compensation, and accordingly, States have amended their prevailing wage laws to include employee benefits in determining the prevailing wage.

Nothing in ERISA expressly prohibits States from maintaining prevailing wage laws. There is no indication that Congress intended ERISA to prevent the States from setting the terms and conditions under which they contract for the procurement of public works, goods, and services. Congress was concerned about the States as regulators, not as consumers, and in an analogous situation, the U.S. Supreme Court last year ruled that Federal labor law should not be construed as preempting State and local governments from setting the terms under which they contract for construction services on public works, absent a clear congressional intent to do so. The Court distinguished between State as regulator and State as consumer.

S. 1580 and H.R. 1036 would restore ERISA to its original intent by clarifying that States are free to require the payment of prevailing wages under public works contracts, provided that the State law does not require any employer to establish or maintain a plan. A requirement that a public works contractor pay prevailing employee benefits or the cash equivalent is not the kind of State law that Congress intended to preempt.

My fourth point relates to the apprenticeship provisions of the bill. The same public contract analysis explained earlier applies to State apprenticeship laws, which typically overlap with State prevailing wage laws. But there is even more to be said. States have long served an essential and expansive role in the joint Federal-State partnership for the regulation of apprenticeship training and employment. The States were engaged in regulating apprenticeship long before the Federal Government. The Fitzgerald Act of 1937 was intended by Congress to preserve for States a key role in apprenticeship.

Under the Fitzgerald Act, States reserve exclusive authority to regulate apprenticeship for State purposes, such as State subsidies for training, and employment of apprentices in State-certified programs. For Federal purposes, the Labor Department's Bureau of Apprenticeship and Training has formally recognized State apprenticeship councils in more than 25 States as having exclusive authority to register and regulate apprenticeship programs in accordance with minimum BAT regulations and such additional standards as the councils deem appropriate.

The States invest heavily in apprenticeship regulation and design that regulation to suit the particular needs and goals of each State. According to the General Accounting Office, the States have spent almost three times as much money as the Federal Government's Bureau of Apprenticeship and Training on apprenticeship. The displacement of the States from their traditional role would leave a huge financial hole for the Federal Government to fill.

There is no indication in ERISA or its legislative history that Congress intended to interfere with the Fitzgerald Act.

There is nothing in H.R. 1036 that would prevent Congress from later enacting a new regulatory scheme for apprenticeship training and employment if, after public input and due deliberation, it decided that the Fitzgerald Act system should be modified. That is the role of Congress, not of the courts.

Finally, if I may, Mr. Chairman, let me add a word about the importance of the mechanics' lien and collection provisions of the bill, which have not been seriously opposed by any group. Our members' health insurance, pension, disability and other benefits depend on the ability of our plans to collect collectively-bargained employer contributions needed to finance these plans. ERISA's foremost purpose is to encourage the creation and sound financing of these vital employee benefit programs.

It is perverse that the courts have misconstrued ERISA as preventing workers and their benefit plans from using mechanics' liens, payment bonds, and other collection tools made available under State law to all other creditors. Workers have been reduced by the courts to second-class citizenship when it comes to collecting what they are owed. Your bill would correct that, Mr. Chairman.

The building and construction industry is characterized by small contractors who are mobile and work primarily on short-term projects. Without mechanics' liens, surety bonds, and other means of collection long provided by the States to workers and their benefit plans, millions of dollars in past-due contributions are being lost to our plans; plans are being left with uncollectible judgments.

I am advised that there are many bonding claims for unpaid benefit contributions which bonding companies are contesting on ERISA grounds. The claims are not being denied on substantive grounds, but rather, the bonding companies are trying to escape their payment obligations through ERISA preemption loopholes.

For example, we have provided the subcommittee with a series of letters concerning the refusal of the United States Fidelity and Guaranty Company to honor its payment obligations under the Illinois public statute.

Let me say in conclusion, Mr. Chairman, that this legislation should be supported by all Senators. It will restore States' rights and worker protections from unintended Federal preemption.

Thank you very much.

Senator WOFFORD. Thank you, Mr. Ray.

[The prepared statement of Mr. Georgine appears at the end of the hearing record.]

Senator WOFFORD. Mark Thierman is an attorney representing Associated Builders and Contractors, ABC, from San Francisco. Did you come for the last hearing?

Mr. THIERMAN. I came here twice, actually. The second time, I was notified in time, but I was in New Jersey for another matter, so I kind of wrapped them together, and then half of it fell apart. But Washington is a nice place, and my mother lives in New York, so I visited her.

Senator WOFFORD. You receive medal number three or four.

Mr. THIERMAN. Let me start out by telling you that, according to the Wall Street Journal—and I am sure that Members of Congress

and the Senate have seen the article—it is estimated that this bill is going to cost 180,000 new jobs, by estimates from the Bureau of Apprenticeship and Training. By the University of Pennsylvania, this bill is going to cost 500,000 to 750,000 new jobs.

The reason that this bill is going to cost jobs is because it is basically choking off access to apprenticeship. I am the attorney who brought most of the cases they are complaining about. I represented the Southern California Chapter of ABC in the California U.S. Supreme Court, and that was a 7-to-zero decision. And believe me, the California U.S. Supreme Court still has some very liberal judges on it.

I represented the ABC in Nevada which brought the McDonald decision, and that was a decision, both at the lower level by a Democratic-appointed judge, Judge Thompson, and at the higher level in the Ninth Circuit by Judge Hugg, who is very well-respected in the education community.

I would also say that Senator Foley's campaign manager appointed to the Federal bench, Judge Quackenbush, was the one who wrote the Washington decision that declared their law unconstitutional.

So we are not talking necessarily about a Democrat versus Republican issue. We are talking about an in versus out issue. We are representing the people who want to get into the program and have been kept out by rules that say there shall be no parallel programs, which is the Washington State rule, or the California rule, which I knocked out, that said the following: No new program shall adversely impact an existing program. If a program is different than an existing program, it can be different in one of two ways. It can either be better than, in which case it is competitive with and therefore adversely impacts the existing program; or it can be worse than, in which case, it is using up scarce resources and adversely impacts an existing program. That is what the California U.S. Supreme Court threw out.

We need training. We need everybody to be trained. One of the things that is going on in this bill is in the details. We are not arguing that that and the Federal rules are bad. We think they are good. We think we need better standards federally, nationally. We want an apprentice trained in Texas to be able to work in California, to be able to work in Washington, to be able to take those skills where the jobs are. Construction is a very mobile industry. People travel all the time. We need a uniform standard, and up until now, we have not been getting it from the Federal Government. We expect with this administration that we will.

The emphasis needs to be put on that to create a uniform standard, not to create a country club that keeps people out. The plain fact is that there are 250 apprentices in the ABC southern California program now training, working, paying taxes because of my court case.

There are eight programs that were approved yesterday by the State of Washington, nonunion programs, because of those court cases. We want into the process, not out of it.

Let me also talk a little bit about the first part of the bill. We agree about the prevailing wage and the benefits. We want the Davis-Bacon standard. Why do you think that the Communication

Workers of America were the plaintiff in that Pennsylvania case? It was not just ABC. It was ABC, Bell Atlantic and CWA. Why? Because their benefit levels are different than the building trades. Why is that? Because CWA—and I mean no offense—is a female-dominated company, and females have different life expectancies, different benefit costs.

The old rules were that every, single item that the union said was a prevailing benefit had to be paid either line item by line item or in cash. So if I had a benefit program that cost $3, and I was a nonunion contractor or a union contractor from another area, and I came into this area and I took my people with me—portability of benefits—and I paid over the quote $2 prevailing, I would not get credit for it.

The Federal Davis-Bacon was enacted and amended to include benefits, and the way the Federal Davis-Bacon includes benefits is it says you get credit dollar for dollar for any legitimate ERISA benefit, and it does not matter whether you are union, nonunion, whether it is a New York benefit or a California benefit, because I know many people who walk in my office—because they know I represent the ABC, but they also know that I sometimes represent employees pro bono—and they say, "Look, I have 5 years in Kansas, and I have 3 years in Pennsylvania, and I have 2 years here and 5 years there, and I cannot get my benefit." I say that that problem is being somewhat cured by portability and reciprocal agreements, but this bill will deaden those agreements because you cannot get credit for employee benefits that are above the line item.

We are not asking that you knock out all employee benefits. We want the total package concept. We say, look, the prevailing wage—using the previous example—is $20 in wages and $5 in benefits. As long as you pay $25 an hour per person for every hour worked, however it is worked out, as long as there are legitimate benefits, ERISA-qualified benefits, they should get full credit for that.

The case in California that knocked out the line item by line item, which is the comparable case to GE—and by the way, GE was a Teamster case; Teamsters' Union does some construction work—Teamsters—I am talking about union versus union—Steelworkers do construction work; CWA, with the fiber optics, arguably, whether it is construction work or not, is certainly covered by prevailing wage. The case that I brought was on behalf of a union contractor in northern California who would take his crew down south, and he would work them under the northern California rates because he wanted to maintain the benefits to the home local. And because southern California has a different benefit structure, he got sued by the State, saying, you are not paying properly, even though his total package was equal, or actually greater than, the southern California rate.

The reason I sued on behalf of this client, J.R. Roberts, was to knock out that artificial distinction that says that every, single community, because certain unions go county by county—IBEW, for example, Carpenters, although broader areas—every county has its own benefit structure, and therefore you disadvantage any kind of traveling contractor.

One of my other clients who asked me to speak on behalf of this bill is the Bay Area Black Contractors Association. They work four, five, six counties in San Francisco, and they each have a different benefit rate. They want apprentices, and 85 percent of their membership is nonunion. They will not agree to a union apprenticeship program, so they work at prevailing wage, with no apprentices, and therefore, they are high on their bids, and they cannot compete.

We want them to have an apprenticeship program. We want them to train people. We want full credit for every dollar they spend on apprenticeship from the prevailing wage. And frankly, in the area of apprenticeship, the new programs are going to have higher start-up costs per employee than the old programs. So therefore, to set the old program as the prevailing rate for apprenticeship contribution defeats the purpose.

In some areas of the country, there are no prevailing benefit levels. In the South and the Deep South, there are none. If I were a contractor coming from California, whether I am union or not, and I had a 10 percent money-purchase plan, or a 10 percent pension plan, and I went into Georgia, I would not under this bill get any credit for that contribution. That is wrong. We want to encourage benefits. We want to encourage people to pay their benefits.

I disagree with Senator Kennedy on the intent of ERISA, and Congressman Fawell expressed it very well on the House side. ERISA was designed to preempt anything that is a special rule just for pension plans, a special rule just for health and welfare plans. The reason these lien statutes, a lot of them, have been knocked out is because they said that the pension plans, the health and welfare plans, had special rights different than the normal contractor rights, different than the normal worker rights. In California, they were given right to lien jobs without any notice. Now, the reason nobody is harping on that from the open shop side is we feel that if this bill is passed, those extra lien rights, those extra bonding rights, if they are not made uniform, if they are not the same for union versus nonunion contractors—in other words, a worker has the right to lien a job, therefore the trust fund has the right to lien the job to the extent that money is owed on the job—if they are not made uniform, the market will shift away from the unions.

Owners—I represent many owners—will not use union contractors. Bonding companies or insurance companies will say, "Look, you are union. I have an extra liability out here. I want a higher premium from you," if you have a different set of rules for each group.

They do need to collect their benefits, and everybody should have the same lien rights, the same mechanics' lien rights, the same bonding rights, whether it is a benefit plan or the worker himself. If you have this distinction, the market is going to shift away. And I am telling them this—and they do not believe me, but I am telling them for their own good, because the last time we had this argument was over the Multi-Employer Pension Amendments Act, and that basically wiped out pensions. How many new contractors or new employers that get organized are ever going to contribute to a defined benefit plan now that MEPAA has its unfunded liability? None. They will take a strike, they will go to the death before

they contribute to a defined plan. Why? Because they are afraid of that liability.

The same thing is going to happen with benefits. You organize a shop—the IBEW, the CWA, or any other union organizes a shop, and the first thing the contractor is going to say is, "I am not paying into your benefit program, and I am not going to match your benefits. And I want a uniform benefit no matter where I travel." We are at impasse, and that does not lead to good collective bargaining.

I think the last issue of this bill hurts the unions. If they want it, they can have it, but I think it hurts them. The other two hurt America. It hurts our system of open construction, our system of letting everybody have a chance. And as the Teamster business agent once said to me, "You guys can train all you want. We will organize it when you get done with it." And I believe that. That is what they are supposed to do, and that is what they will do.

This bill will not impact any existing program, and any existing union program, it will not make it any better. What it will do is it will keep out new programs. That is all it will do, and that is all it is designed to do. And that is not America. If somebody wants to come into the industry—and most of the new entrants into the industry, believe it or not, are minority groups trying to get into the industry—those people need training, those people need an opportunity to train, and believe it or not, this whole process costs the Government so little. We are not talking about spending money to pay for the training; the contracts are doing that. This is the most cost-effective job training program there is in the country, and we are turning around and saying 80 percent of the American population cannot have access to it.

We should be expanding it to other crafts outside the construction industry. We should be expanding it everywhere. It works. It works globally. It has been working since the days in history—I like to tell the story that Abraham was an apprentice idler maker. He was an apprentice. We read about Johnny Tremain when we were in high school. The man was an apprentice silversmith. So this system has been going on from the guilds, it has been going on before there was any Davis-Bacon Act, it will continue to go on. This is the way people in the construction industry and in other trades learn their craft.

It works, it is inexpensive, it pays for itself. Why are we denying access to this program to the vast majority of Americans? That is what this bill in the wording does. The concepts are good concepts. We have some problems. The wording does the exact opposite. The wording takes people out of the system instead of encouraging them. The wording is anti Davis-Bacon Act, because it says that the benefits in New Jersey are going to be line item by line item, and do not let any New York contractor, whether it be Teamster or IBEW, come into New Jersey, because they will have to pay a different benefit scale, and under ERISA, he cannot do that.

That is why this bill should not be passed in its present form.

Senator WOFFORD. Thank you.

[The prepared statement of Mr. Thierman follows:]

PREPARED STATEMENT OF MARK THIERMAN

Mr. Chairman, my name is Mark Thierman of Thierman Law Partnership and I am testing on behalf of the over 15,000 contractors, subcontractors- suppliers and related companies of the Associated Builders and Contractors (ABC). We greatly appreciate this opportunity to testify on S. 1580, which adds preemption amendments to the Employee Retirement Income Security Act (ERISA). ABC members represent the majority of the construction industry which believes in the selection of bidders and performance of construction projects on the basis of merit, without regard to union or non-union status.

ABC members and others who share their views operate in all 50 states and typically perform work in multiple local jurisdictions within the states. Many of ABC's members also perform work funded wholly or in part by state and local governments. Many of these governments impose "prevailing wage" laws with which construction employers must comply, and many states also establish apprenticeship standards affecting ABC members and their employees.

S. 1580 seeks to amend ERISA by exempting three broad categories of state laws from the federally preemptive provision of Section 514 of the Act. These state laws deal with prevailing wage laws, apprenticeship and training laws and mechanic's lien laws.

In this regard, the bill seeks to overturn these and other properly decided cases: General Electric v. New York State Department of Labor, 891 F.2d 25 (d Cir. 1989), cert. den. 110 S. Ct. 2603 (1990) on the prevailing wage issue; Hydrostorage v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. den. 111 S. Ct. 72 (1990) on the apprenticeship and training issue; and Iron Workers MidSouth Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir. (1990), and Carpenters Southern California Administrative Corporation v. El Capitan Development Co., 53 Cal.3d 1041 (1991) on the mechanic's lien issue.

ABC believes that the bill's attempt to overturn these decisions will seriously undermine one of the fundamental purposes of ERISA and would impose substantial unnecessary burdens on many construction industry employers.

One of the principal reasons for Congress' enactment of ERISA in 1974 was to foster the growth of employee benefit plans by promoting uniform federal regulation of those plans. In order to accomplish this goal, Congress recognized the importance of eliminating the threat of conflicting or inconsistent state and local regulations of employee benefit plans.. One of the law's sponsors, Congressman Dent, described the reservation to federal authority of the sole power to regulate the field of employee benefit plans as ERISA's "crowning achievement." 120 Cong. Rec. 29197 (1974). Senate Sponsor, Senator Williams, stressed that with the narrow exceptions specified in the Act (relating to insurance contracts, banks, trust companies, or investment companies), the principle of federal preemption was intended to apply in its broadest sense to all actions of state or local governments relating to benefit plans. Id., at 29933.

Federal uniformity in the regulation of employee benefit plans is particularly important to the construction industry, which by its nature requires transitory employment in multiple locations, both from state to state and within numerous localities in individual states. Construction industry employers, both union and non-union, offer a wide variety of benefits to their employees. The successful administration of these benefits would be severely handicapped if construction employers were subjected to divergent state and local regulations of these benefit plans.

The General Electric, Hydrostorage and Iron Worker cases, and many others, are consistent with this fundamental goal of ERISA, and it would be a mistake for Congress to overturn these decisions. These cases dealt with narrow and aberrational state laws which imposed special interest, "locality-specific" benefit plans on construction industry employers, in direct violation of ERISA.

THE GENERAL ELECTRIC CASE

In the General Electric case, the U.S. Court of Appeals for the Second Circuit struck down that portion of New York's prevailing wage law which required all construction contractors performing state-funded work to provide "benefits" to their employees which matched specific fringe benefits determined to be "prevailing" in the area. 891 F.2d 25. In each instance where the cost of a benefit provided by the employer did not correspond with the cost of a similar local benefit found to be "prevailing" by the state, the state law required the employer to bring the cost of this prescribed benefit into equivalence with the cost of the local benefit or to pay the additional cost directly to the employees. As is noted in the Court's opinion, the state law did not permit employers to substitute one form of benefit "supplement"

for another. Employers also received no credit under the statute for their cost of providing benefits which were not deemed to be "prevailing" benefits by the state commissioner. 891 F.2d at 27. Therefore, these employers were placed at an economic disadvantage when bidding on public works jobs.

The Court of Appeals properly found that this New York law violated ERISA's preemption requirements in several different ways. First, the statute required employers to bring their pension and welfare plans into conformity with those mandated by the state. Second, the law required employers to keep records concerning their conformance to the state rules and regulations for the benefit plans. Third, the state controlled the nature and amount of benefits provided. 891 F.2d at 29.

It should be mentioned that the employer in that case, General Electric, already had a unionized benefit plan which it applied uniformly wherever it performed construction work. Yet, G.E. was given no credit for the value of its plan and was required to pay additional "benefits" on a plan-specific basis under the New York law. As was further pointed out by the court, the problem of allowing such regulation of benefit plans under the guise of prevailing wage laws extends not just to the states, but to individual localities within each state, which themselves lack uniformity.

Thus, it is simply wrong to assert that the General Electric case "wipes out" traditional state prevailing wage laws. Rather, the General Electric case properly prevents states from misusing their prevailing wage laws to regulate employee benefits. As further discussed below, very few state prevailing wage laws impose fringe benefit requirements in the same intrusive way as New York. If the General Electric decision is overturned, however, and state regulation of employee benefits is permitted under the guise of prevailing wage laws, then construction employers would be unable to establish uniform benefits for their own employees, and the basic purpose of ERISA would be frustrated.

S. 1580 would exempt from preemption under ERISA most state laws concerning "prevailing wages." While these prevailing wage laws may on their face appear to be in the public interest, they are often in the words of one federal court "a special interest group deal in public interest clothing."

Another example is the Commonwealth of Pennsylvania's Prevailing Wage Act. Recently, Bell Atlantic—Pennsylvania, Inc. (formerly the Bell Telephone Company of Pennsylvania), a Bell Atlantic Subsidiary, and the Communication Workers of America (CWA), AFL-CIO, District 13, the labor organization representing certain Bell employees were successful in getting the Pennsylvania Act invalidated on the ground that the act was preempted by ERISA. (That decision is currently on appeal before the United States Court of Appeals for the Third Circuit).

Like other prevailing wage laws, the Pennsylvania Act mandates specific levels of cash wages and benefits that contractors must pay their worker on public works projects. The Commonwealth of Pennsylvania determines the prevailing rate by simply adopting the labor agreements negotiated between certain favored contractors and unions. Total cash wages and benefits paid by a contractor are not considered when assessing whether a contractor is in compliance with the Pennsylvania Act. Instead, the Commonwealth insists that contractors meet their obligations under the Act by matching two components of the prevailing wage rate -cash wages and benefits separately. While the Commonwealth will permit a contractor to make up for benefits that are less than the prevailing benefit rate with extra cash payments, the story scheme does not permit a contractor to use excess benefit' plan contributions to make up for cash wages that may be below the prevailing cash wage rate.

In the case of Bell Atlantic-Pennsylvania and CWA, these parties at their bargaining table often choose to allocate more compensation dollars to benefits and fewer compensation dollars to cash wages than the favored contractors and unions whose rates are deemed prevailing so choose. While it turns out that the Bell-CWA total compensation package is usually more generous than the prevailing package, Bell and its CWA-represented employees are effectively precluded from the public work. Under the Pennsylvania Act, rather than negotiate its own collective bargaining agreement, Bell must adopt agreements that mirror the cash wage and benefit rates adopted by the favored unions or contractors or Bell must pay extra cash wages to employees to cover the "shortage" between Bell's cash wages and the cash wages determined as prevailing in order to perform public work.

In effect, the Pennsylvania Act by not giving credit for the benefits actually paid, discourages a contractor from making benefit contributions beyond predetermined levels and dictates or restricts the level of benefits paid to workers. This type of state statutory scheme contradicts the goal of Congress in enacting ERISA in that it leads to a patchwork scheme of regulation subjecting employers to conflicting and inconsistent state and local regulation and making it impossible for a company like

Bell Atlantic and others which operate nationwide to have uniform or centrally administered benefit plans which function simultaneously in different states.

S. 1580 would exempt from ERISA preemption Pennsylvania's law and other similar laws and would authorize states to intrude upon ERISA plans by requiring contractors, as a condition for competing for public work, to provide predetermined levels of benefits and to discourage benefit contributions above those predetermined levels. Bell Atlantic-Pennsylvania is a unionized employer which strongly opposes S. 1580.

THE HYDROSTORAGE CASE

A similar issue is presented by the Hydrostorage case with regard to apprenticeship programs. 891 F.2d 719. Again, the state law which was set aside by that holding went beyond generally accepted areas of state concern and imposed specific benefit requirements on construction employers. In Hydrostorage, California had adopted state apprenticeship standards which required construction employers on publicly funded work to participate in and contribute to a particular union apprenticeship program, and the state further established the manner in which such participation and funding would take place. The California law required Hydrostorage to apply to a union apprenticeship committee for permission to train apprentices and to sign an agreement to train its apprentices solely in accordance with the union apprenticeship program.

Again, the Court of Appeals acted properly in invalidating the state law because it required construction contractors on public works projects to become bound by a specific apprenticeship plan. The state law went beyond the traditional realm of setting minimum state apprenticeship standards by requiring direct contractor participation in and contribution to specific apprenticeship plans.

Apprenticeship plans are important benefits which many construction employers both union and non-union, offer on a multi-state and multi-locality basis. Such. plans are specifically protected by ERISA from state interference and are expressly included in the language of the Act defining benefit plans. See 29 U.S.C. Sec. 1002(1). There is no need or justification for promoting the type of individual state-by-state regulation of apprenticeship plans which would occur under the present bill.

This case may have already been substantially modified and to a certain extent limited by recent decisions from the Ninth Circuit Court of Appeals in Electrical Joint Apprenticeship Training Committee v. MacDonald. 949 F.2d 270 (1991), the most recent California Supreme Court case of Southern California Apprenticeship Council; 4 Cal. 4th 422, 14 Cal Rptr. 491 (1992), ad the United States Court of Appeals for the Second Circuit in Joint Apprenticeship and Training Council of Teamsters Local 363 v. New York State Department of Labor, 38 BNA Daily Labor Reports 1420 (Jan. 27, 1993). These cases clearly allow states to regulate apprenticeship consistent with federal law pursuant to the National Apprenticeship Act, 29 U.S.C. & 50, commonly known as the Fitzgerald Act, and its implementing regulations found at 29 C.F.R. Part 29.

THE IRON WORKERS CASE

Finally, there is no justification for overturning ERISA's preemption of state statutes authorizing benefit trust funds to utilize mechanic's lien laws for the purpose of enforcing obligations allegedly owed to those funds. Iron Workers, supra, 891 F.2d 548. See also Carpenters Southern California Administrative Corp. v. El Capitan Development Co., 53 Cal.3d 1041, cert. den., 112 S. Ct. 430 (1991).

In Iron Workers, the Court of Appeals for the Fifth Circuit properly held that ERISA preempted Louisiana's Private Works Act, which allowed employee benefit plans to assert claims for trust fund obligations against property owners for whom the debtor-employer had worked. Similarly, in El Capitan, the California Supreme Court found ERISA preempted California's mechanic's lien law which, unlike most such state laws, specifically provided employee trust funds with lien rights against real property.

Both courts properly recognized that ERISA has established detailed, comprehensive, and uniform remedies for delinquent trust fund obligations. The state laws at issue improperly supplemented the exclusive federal remedies. The Iron Workers court further distinguished Mackey v. Lanier Collections Agency, 486 U.S. 825 (1988), which had permitted generally applicable state laws for enforcing garnishment judgments to be used by trust funds. As the Fifth Circuit noted:

[T]he lien statutes involved here do more than provide remedies for collecting judgments; they create substantive rights. [They also] give ERISA plans as well as employees and laborers rights against not only employers, but property owners. The

[lien law] creates a substantive right against the property owner that is not created by ERISA, and goes beyond being merely a means of enforcing a judgment. 891 F.2d at 555-556.

The court further found that the state lien law was not merely "remote" or "tenuous" in its effect on ERISA plans, but instead had a "substantial" effect, adding entirely new parties to trust fund litigation. Finally, the Fifth Circuit found that the legislative history of ERISA evidenced no intent on the part of Congress to allow states to create new substantive rights for benefit plans under the guise of lien laws. Thus, as the courts have recognized, ERISA has established a detailed and comprehensive enforcement scheme for trust fund contributions. Allowing divergent state remedies to be enacted expressly for use by trust funds would again prevent employers from knowing with any certainty what their benefit plan obligations might be, in direct contravention of ERISA's intent.

It should also be noted that, although mechanic's lien laws are relatively common, their use by multi-employer trust funds is rare. Such laws are normally enacted for entirely different purposes having to do with the inability of contractors to enforce their rights to payment for work already performed. There is certainly no overriding state interest in extending mechanic's lien enforcement to multiemployer benefit plans, whereas the effect of such an extension is clearly to disrupt the otherwise uniform federal scheme for enforcement of ERISA rights.

In a similar case, a Nevada statute holding general contractors liable for benefit plan contributions owed by a subcontractor is ruled preempted by ERISA, by the U.S. Court of Appeals for the Ninth Circuit, Electrical Workers Health and Welfare Trust v. Mario Corp., CA 9 Nos. 91-16150, -16581, and 16610,3/16/93.

The court ruled that the state statute "relates to" benefit plans and, thus, is covered by the broad preemption provisions of ERISA, affirming a decision of the U.S. District Court for the District of Nevada. The district court had relieved Grant General Contractors and Tibesar Construction Co. of liability for payments to the International Brotherhood of Electrical Workers trust funds for work performed on separate projects by subcontractor Mario Corp., operating as non-union Desert Valley Electric.

The judge wrote for the court that ERISA contains a "unique" preemption provision impacting on any state statutes as they "relate to" benefit plans. The Nevada statute holding general contractors liable for their subcontractor's benefit plan contributions falls within the meaning of the broad ERISA preemption, he said. The federal preemption applies even though the state law made no specific mention of employee benefit plans.

The court also rejected the fund trustees' contention that Congress intended to narrow ERISA's broad preemption provision when amending the federal pension law in 1980. The unanimous decision emphasized that the legislative history does not support that conclusion.

PROPONENTS ARGUMENTS ARE NOT VALID

The intent of the proponents is simple. The proponents, the Building and Construction Trades Department specifically, seek a "carve-out" of the federal preemptive provisions of ERISA. In the process of overturning properly decided "technical" legal cases, these special exclusions equate to a large windfall to these unions. The windfall to the special interests comes at the expense of fair competition, increased workforce education and training, and at the expense of workers seeking opportunity. The exclusion from ERISA in reality allows union companies to exclude non-union companies from the competitive bidding process for publicly funded projects. As a result, the cost of employer provided health care increases and workers are excluded from non-union training programs, minorities, women and young people in particular.

ABC must take issue with the proponents arguments.

First, it is not true that two of our largest states' prevailing wage laws were struck down or that courts have stripped employee protections from states. In New York and Pennsylvania, only the "prevailing benefit" portion mandating the employer to make varying benefit payments in addition to those already provided to workers was affected. The state laws did not permit employers to receive credit for the benefits already provided to its workers, requiring additional costly benefit payments. ERISA was intended to prevent conflicting state laws from affecting employers' ability to maintain uniform benefit plans.

The proponents grossly misstate, that all fifty state laws setting standards for certification or training of apprentices have been struck down. Invalidated were the California and Nevada state laws that essentially prevented non-union employers from training their own workers. The only alternative in these states for non-union

employers was to contribute to union training programs or be prevented from training its own workers. We do not believe the California and Nevada state apprenticeship laws deserve preferred exemption from ERISA. Further, in 1992 California's Little Hoover Commission report concluded that the California law hampered the creation of new training programs and impeded access to training for minorities.

The proponents also state that, in ERISA, Congress never addressed the state laws in question. On the contrary, health, apprenticeship and other benefit laws were clearly contemplated. Congress clearly intended to prevent conflicting laws relating to any employee benefit plan. It is without question, that state laws affecting the ability of an employer to administer health plans, as in New York, were intended to be addressed. Without uniformity in health plans, it would be impossible to administer these employer sponsored plans. ERISA is a primary reason that over 130 million people are covered under employer-sponsored plans. ERISA specifically defines apprenticeship and other training programs as employee benefit plans. In 1974, Congress deliberately included apprenticeship programs in ERISA. The language was taken directly from the employee benefit plan definition in the 1947 Taft-Hartley Act. To say that Congress did not address apprenticeship programs or intend for all of ERISA's provisions to apply is false.

CONCLUSION

Before Congress disrupts the carefully constructed plan of uniform federal regulation established by the framers of ERISA in 1974, there should be a very substantial showing of need and justification for the change. There is no such need at the present time, nor is there any justification for overturning properly decided cases dealing with overbroad state laws. Any changes which need to be made in the regulations or remedies pertaining to employee benefit plans should be accomplished on a uniform basis throughout the nation.

The framers of ERISA recognized that without broad preemption of conflicting state laws, employers would be discouraged from investing their resources in employee benefit plans, to the detriment of employees. Congress must remain vigilant in protecting ERISA's most successful achievement from special interest exceptions which will erode and defeat the law's fundamental objectives.

ABC strongly urges Congress not to seek enactment of S. 1580.

Senator WOFFORD. Leo Garcia, of San Diego, for the Associated General Contractors.

Mr. GARCIA. Thank you, Senator. I certainly appreciate your patience and understanding.

My name is Leo Garcia, and I am the director of the apprenticeship training program sponsored by the San Diego Chapter of the Associated General Contractors of America. I have shortened my remarks and ask that my full written testimony be included in the record.

Senator WOFFORD. It will be so included.

Mr. GARCIA. Senator, I am very fortunate to be here, especially hearing that you have the apprenticeship background. For those of us who are really out working in the trenches, it is especially gratifying to us to know that, with your background, you will certainly understand what we are speaking of.

I am very sorry that Senator Kennedy left, because I was hoping that with my remarks, I might have been able to change his mind, knowing that he has already made his up, even before hearing our testimony.

As I said, I have a little edge over you, Senator, in terms of apprenticeship knowledge, because I have been involved in apprenticeship training for about 29 years, and I have a unique experience because I have been involved in all different phases of the apprenticeship system.

I have been the director of training since the program was started in 1988, and I have worked in the apprenticeship area for 29 years. In 1965, I was fortunate to be employed by the Mexican-

American Opportunity Foundation in East Los Angeles, where I served as director of the apprenticeship outreach program funded by the U.S. Department of Labor. There were LEAP programs under The Urban League and so on, and this one was specifically for Mexican-Americans in East Lost Angeles. This was also cosponsored by the Los Angeles Building and Construction Trades Council. I worked with this foundation until 1977.

From 1977 to 1988, I was employed by the State of California Department of Industrial Relations, Division of Apprenticeship Standards. The DAS, as it is called, is responsible for regulating apprenticeship training throughout the State of California. I was a senior apprenticeship consultant and became an area administrator with that same outfit in charge of the five southern California counties—Orange, Riverside, San Bernardino, Imperial, and San Diego Counties.

I was in charge of overseeing that all approved apprenticeship committees were in compliance with all apprenticeship laws and regulations, and that the approved apprenticeship standards were followed. I might add a footnote that all of those programs were strictly union programs, because at that time, those are the only ones that were in existence.

Twenty-9 years of experience give me a unique perspective on apprenticeship and training issues. I feel that S. 1580 will kill apprenticeship programs like the one I helped AGC formulate.

My testimony will focus on the negative impact of this bill on training activities. S. 1580 will limit opportunities for minorities, youth, and women in apprenticeship programs.

The apprenticeship system in America was originally organized by the labor movement, which helped draft all the laws governing apprenticeship and training. The laws have not changed, and the unions continue to dominate and control the system to this day. Union apprenticeship plans have had a monopoly on apprenticeship in my State of California since the 1930's.

In 1984, there were approximately 60,000 apprentices throughout California. By 1988, 65 percent of California's construction was performed by nonunion contractors, and the number of apprentices fell drastically, to a modern low of 36,000. There has never been such a dramatic reduction in the number of apprentices in my years involved in the apprenticeship system. This reduction in number of apprentices is mainly due to the fact that primarily union-sponsored apprenticeship programs are approved by the State. At the same time, large numbers of former union contractors became open shop contractors, thus eliminating even further training opportunities.

It is ironic that a contractor who has been training for the last 50 years under a collective bargaining agreement, the minute they decide not to sign that collective bargaining agreement, according to the State of California, they are no longer qualified to train apprentices.

Non-union construction employers are denied access to union apprenticeship plans. Training opportunities are therefore limited to only those employees of the 25 percent of the contractors who are unionized. The remaining 75 percent in the open shop sector are thus excluded. As open shop programs are restricted in their devel-

opment and growth, the number of apprentices will unfortunately continue to decline.

In my time with the DAS, it was obvious that union apprenticeship programs severely limited the entry of minority youth into the building trades. That is probably the reason why they set up apprenticeship outreach, because minorities were not able to get into those coveted apprenticeship opportunities.

The percentages of minorities in the union apprenticeship plans has traditionally been low. For example, the Riverside Electrical Apprenticeship Program refused to comply with the State's plan for equal opportunity and access in apprenticeship. Despite the threat of DAS decertification, this program continues to operate under the same discriminatory conditions as of today.

The State of California is politically blinded to this activity. This was the big factor in my decision to leave the State agency and help found the AGC apprenticeship program. The AGC apprenticeship program was created partly for the purpose of promoting the wider use of minorities in the construction industry, and believe me, we have succeeded in doing this. Our program trains a higher percentage of minority apprentices than the local union programs in San Diego; 50 to 65 percent of our apprentices have traditionally been minorities. And by the way, Senator, our wages and fringe benefits are identical to the unions in the area.

Additionally, one phase of our program places very special emphasis on attracting minority youth and women to construction jobs directly from high schools. We have established a pre-apprenticeship program to area high schools to recruit minority and women high school students. The top students gain entry to our apprenticeship program after graduation. All of the students who participate are exposed to construction techniques, safety, blueprint reading, and estimating.

This is a prime example of the school-to-work idea that we initiated 5 years ago. Even those who do not enter our apprenticeship program are exposed to other job opportunities within the construction industry. This program is extremely popular. It is a demonstrated success in bridging the school-to-work gap.

The program has also initiated and been approved to teach its aapprentices in Spanish, English, and bilingual classes. No other apprenticeship program in California or in the Nation has done this.

In California, it has been the experience of the San Diego chapter of the AGC that State apprenticeship laws stifle apprenticeship training. For example, the California Apprenticeship Council, the CAC, has actively resisted the growth of the San Diego AGC training program, prohibiting it from accepting applicants outside of San Diego County.

AGC's experience has shown that the delays in implementing new or expanded training programs can be interminable as the approval process meanders through a State's bureaucracy. In 1990, the AGC Apprenticeship Fund of San Diego submitted an expansion request to the California Apprenticeship Council. The final CAC decision was not issued until nearly 2 years later. And we had contractors waiting and waiting to hire apprentices.

For example, approval to expand an existing program in California to include apprenticeship training for tile layers in San Diego took over a year and a half. These delays in obtaining approval to operate under California State law were exacerbated by the fact that the existing program operated by the building trades was allowed to participate in the approval process as a party.

California State law requires that the existing union program be consulted about the approval of any competing program, such as AGC's. How would you like it if you had the opportunity when they are going to vote for you if you could approve the other candidate and if you thought it was okay for him or her to run against you? That would give you quite an edge, wouldn't it?

Every procedural device was used to prevent or delay the approval of the AGC's apprenticeship program. The experience of the AGC Apprenticeship Fund of San Diego is not unique. Emerging apprenticeship programs in other States have likewise encountered similar roadblocks to the development and expansion of their programs.

A review of the reported decisions in this area shows that it is a common practice in those States which have apprenticeship laws to enforce those laws so as to restrict the development and expansion of competing programs—to the detriment of workers who hunger for apprenticeship training in the construction industry.

For these reasons, Senator, the protection of ERISA preemption is necessary if programs like ours are to survive.

Muchas gracias.

Senator WOFFORD. Muchas gracias.

[The prepared statement of Mr. Garcia follows:]

PREPARED STATEMENT OF LEO GARCIA

Good Afternoon. My name is Leo Garcia and I am the Director of the San Diego Chapter AGC Apprenticeship and Training Program. I am here on behalf of the Associated General Contractors of America (AGC) and the San Diego Chapter of AGC.

AGC is a national trade association comprised of more than 33,000 firms, including 8,000 of America's leading general contracting companies. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, multi-family housing projects and site preparation/utilities installation for housing development. AGC member firms compete for work in all states and localities, adding the value of vigorous competition to construction owners in these markets.

My story will hopefully illustrate the continued need for strong federal laws to protect parallel or competing apprenticeship training programs from the narrow interests who would restrict their development and growth within the states. The affect of placing apprenticeship training programs back under differing state laws, as this bill would do, will decimate open shop contractors ability to train apprentices. Further, this bill will further exacerbate the competitive disadvantage of the open shop sector of the construction industry on prevailing wage projects.

Thank you, Mr. Chairman, for the opportunity to testify before this Committee on how S. 1580 will adversely affect AGC of San Diego's Apprenticeship and Training Program that I helped establish 6 years ago. My testimony will focus on the key issues that affect worker training and the continued need for a strong federal mandate as contained in the preemptive provisions of ERISA.

BACKGROUND

S. 1580 would amend the Employee Retirement Income Security Act (ERISA) by exempting state prevailing wage, apprenticeship and mechanics lien laws from the preemptive provisions of Section 514 of the Act.

AGC members perform work in every state. Frequently, AGC members will perform work in multiple jurisdictions within a state. Construction industry employers

and all businesses operating in two or more states have come to rely on ERISA because it provides employers the means to uniformly establish and maintain all types of benefit plans for their employees, without being subject to varying and conflicting state laws.

The provision in S. 1580 removing state apprenticeship training laws from ERISA's broad federal preemption mandate is especially harmful to the open shop sector of the construction industry. Placing DOL certified open shop apprenticeship training programs back under the jurisdiction of each state's "State Apprenticeship Council (SAC)" would severely restrict the ability of open shop contractors to employ trained apprentices, depending on the state laws under which a program has been established.

Currently, 27 State Apprenticeship Council (SAC) states, plus the District of Columbia, establish differing apprenticeship standards affecting AGC members and their employees. AGC believes that before the carefully crafted uniform regulatory scheme of ERISA is disrupted, far more evidence of need and justification must be demonstrated. If S. 1580 becomes law, construction industry fringe benefit programs will be uniquely singled out as subject to any and all state and local regulation.

LEGISLATIVE HISTORY

One of the primary objectives for the passage of ERISA in 1974 was to encourage the growth of employee benefit plans by promoting federal regulation of those plans, and eliminating state and local regulatory impediments to their establishment and administration. To achieve this goal, Congress explicitly recognized the importance of eliminating the threat of conflicting state and local regulations in Section 514 of the Act. Nationwide, the courts have unanimously upheld the broad scope of the ERISA of the preemption provision where ERISA preemption has been challenged. Recently, by an eight to one margin, the U.S. Supreme Court likewise upheld ERISA's preemptive provision. District of Columbia v. Greater Washington Board of Trade, U.S. Sp. Ct., No. 91-1326 (December 14, 1992).

Others testifying before this committee argue that ERISA was never meant to regulate apprenticeship and training programs, that these programs are traditionally an area of state interest and that ERISA was never intended to preempt such regulation. Let me provide the committee with the truth. Nowhere in any statutory language is this stated. To the contrary, ERISA clearly states that its preemptive power extends to employee welfare benefit plans, including "apprenticeship and other training programs (29 U.S.C. Section 1002(1)(A))."

Apprenticeship and other training programs are benefits of employment and as such are defined in and covered by ERISA. A consistent set of rules, as under ERISA, is needed to ensure a fair playing field and to provide wide access to benefits, including apprenticeship and training programs. The state-by-state regulation of apprenticeship programs that S. 1580 would permit promotes parochial interests that have little to do with the training needs of the industry or the consumers of construction services. Further, the legislation is wrongly portrayed as firmly resolving issues of states rights vs. federal jurisdiction.

COURT DETERMINATIONS

With respect to state prevailing wage and apprenticeship laws, the bill seeks to overturn two federal appeals court decision, General Electric v. New York State Department of Labor, 891 F. 2d 25 (2d Cir. 1989), cert. den. 110 S. Ct. 2603 (1990), and Hydrostorage v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F. 2d 719 (9th Cir. 1989), cert. den. 111 S. Ct. 72 (1990). AGC believes that the decisions in these cases represent a sound application of the ERISA preemptive principle, and are fully consistent with the objectives of the Act as it was originally passed by Congress. AGC also believes that reversing these decisions through this legislation will seriously undermine one of the primary purposes of ERISA and will impose substantial and unnecessary new burdens on many construction industry employers.

Because of the temporary and transitory nature of employment in the construction industry, over multiple locations, from state to state and within numerous localities in individual states, consistency in the regulation of ERISA is especially important. A wide variety of benefits are provided to construction employees by both union and non-union employers. The successful administration and delivery of benefits provided by these plans would be seriously impaired if employers were subjected to individual state and local regulation of them.

AGC believes that the court decisions in the General Electric and Hydrostorage cases are reasonable interpretations of ERISA and consistent with the Act's objective to achieve uniform regulation of ERISA qualified benefit plans.

GENERAL ELECTRIC AND PREVAILING WAGES

The General Electric case involved a New York state prevailing wage law that required all construction contractors performing state funded work to pay fringe benefit "supplements" that precisely matched specific benefits found to be prevailing in the locality where the work was performed. If a benefit provided by the employer did not correspond to the cost of a parallel benefit mandated by the state, the employer was required to provide the state mandated benefit, or pay the additional cost directly to employees in cash. Employers were not permitted to substitute one kind of benefit for another if it had not been found to be "prevailing" by the state.

Despite the fact that General Electric paid fringe benefits in compliance with a collective bargaining agreement that applied to all work performed for General Electric regardless of location, state authorities found it to be in violation of the New York prevailing wage law. General Electric received no credit for fringe benefit contributions that were not "prevailing" under the state law. The U.S. Court of Appeals for the Second Circuit concluded that New York's prevailing wage law was preempted by ERISA to the extent that the New York law mandated that all construction employers performing state funded work provide employees with fringe benefit supplements that precisely matched specific benefits found by the state to be prevailing in the locality.

The court concluded that the New York law was preempted by ERISA because it mandated (1) the type and amount of the employer's contribution to a fringe benefit plan, (2) the rules and regulations under which the plan operates, and (3) the nature and amount of benefits to be provided. The court held that Section 514 of ERISA specifically preempts all state laws that relate to employee benefit plans, and observed that permitting this type of regulation of benefit plans under state prevailing wage laws would lead to a much larger and confusing patchwork of such regulations within each state with similar local laws.

HYDROSTORAGE AND APPRENTICSHIP STANDARDS

In the Hydrostorage case, California state apprenticeship standards required construction employers on state funded work to participate in, and contribute to, specific union apprenticeship programs. The law prescribed the method of participation and funding, and required the employer to receive approval to train apprentices from a union and become signatory to an agreement to train apprentices under a union apprenticeship program.

Apprenticeship plans are specifically included in ERISA as employee benefit plans under the Act. The U.S. Court of Appeals for the Ninth Circuit properly concluded that the California law was preempted by ERISA because it required construction employers on state public works projects to become bound by a specific apprenticeship plan, mandating direct participation and contributions to that plan. The court correctly concluded that such direct regulation of an ERISA plan through state law was impermissible.

Apprenticeship programs are a benefit commonly provided to employees in the construction industry, offered by both union employers, through joint apprenticeship and training programs, and non-union employers, through unilateral training programs. In the non-union sector of the industry, these programs are often provided by a single employer or group of employers. Efficient and effective apprenticeship training programs, tailored to the needs of employers, employees and market conditions are essential to maintain the competitiveness of the American construction industry.

The state-by-state regulation of apprenticeship programs that S. 1580 would permit promotes parochial interests that have little to do with the needs of the industry or the consumers of construction services. This directly contradicts the mandate of The Fitzgerald Act (29 U.S.C. 50) to the Department of Labor. The Fitzgerald Act was promulgated "[T]o enable the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such standards."

ERISA does not prevent states from requiring fringe benefit payments to construction employees from their employers performing work on state public works projects. The committee should note that the New York law in the General Electric case does not require construction contractors to provide fringe benefits. Employers had the option of paying the cash equivalent of the fringe benefits found to be prevailing by the state directly to their employees. Nor does ERISA prevent states from establishing training standards to be followed by apprenticeship and training programs.

ERISA does prohibit states and localities from superseding qualified fringe benefit plans and mandating payment for fringe benefits that are not voluntarily incurred

by employers. Likewise, ERISA prohibits states from mandating construction contractor participation in, and payments to, apprenticeship programs dictated by the state. State legislative and regulatory authority should not be used to solve the administrative and funding problems of private apprenticeship entities.

FOR EXAMPLE

Open shop apprenticeship training programs are placed in jeopardy because they are no longer subject to federal law, but 50 different state laws. Certain State Apprenticeship Council (SAC) states have discriminated against open shop apprenticeship training programs that compete or operate "parallel" to existing union programs.

In California, it has been the experience of the San Diego Chapter, AGC that state apprenticeship laws stifle apprenticeship training. For example, the California Apprenticeship Council (CAC) has actively resisted the growth of the San Diego AGC training program, prohibiting it from accepting students outside of San Diego county.

AGC's experience has shown that the delays in implementing new or expanded training programs can be interminable as the approval process meanders through a state's bureaucracy. In1990, the AGC Apprenticeship Fund of San Diego submitted an expansion request to the California Apprenticeship Council. The final CAC decision was not issued until nearly two years later. Approval to expand an existing program to include apprenticeship training for tile layers in San Diego took over a year and a half. These delays in obtaining approval to operate under California state law were exacerbated by the fact that the existing program operated by the building trades was allowed to participate in the approval process as a party. Every procedural device was used to prevent or delay the approval of AGC's "competing" training program.

The experience of the AGC Apprenticeship Fund of San Diego is not unique. Emerging apprenticeship programs in other states have likewise encountered similar roadblocks to the development and expansion of their programs. A review of the reported decisions in this area shows that it is a common practice in those states which have apprenticeship laws to enforce those laws so as to restrict the development and expansion of competing programs—to the detriment of workers who hunger for apprenticeship training in the construction industry.

Recently, the San Diego Chapter AGC established a Pre-Apprenticeship program in the community. The program currently operates with two high schools and in addition to being extremely popular, it is a demonstrated success in bridging the school to work gap. It is growing, and has potential for future expansion to other schools.

AGC of San Diego proudly reports that of the total number of individuals enrolled in the apprenticeship program, 50 to 55 percent are minorities (black and hispanic) and this percentage is down from a high of 68 percent. AGC's Apprenticeship program was created in 1988 and has graduated 45 journeymen since its start. Restrictions and roadblocks have prevented expansion. Without any restrictions and during the same period of time, AGC of San Diego believes that they could have enrolled as many as 5,000 apprentices—and this is a conservative estimate. This program has survived only because those involved in its creation believe in it.

The program has also initiated and been approved to teach its apprentices in Spanish, English, and bilingual classes. No other competing apprenticeship program in California does this.

Lastly, the number of apprentices in the State of California has dropped in the last five years from 60,000 to a low this year of 38,000. As competing or parallel programs are restricted in their development and growth, the numbers will continue to decline. Taking away the protections afforded by ERISA we believe would only exacerbate this disturbing trend.

The use of state apprenticeship laws to frustrate the creation and operation of parallel programs is contrary to long-standing DOL policy of according programs which meet its objectively defined standards the freedom to train apprentices for Federal purposes. To date, the ability of new apprenticeship programs to develop and expand, despite the enforcement of restrictive state laws, can be attributed to only one fact—the vigorous enforcement of the preemption provisions of ERISA If enacted, S. 1580 would undermine this key provision of the Act.

CONCLUSION

AGC believes that before the carefully crafted uniform regulatory scheme of ERISA is disrupted, far more evidence of need and justification must be demonstrated than that shown by the General Electric and Hydrostorage cases. If S.

1580 becomes law, construction industry fringe benefit programs will be uniquely singled out as subject to any and all state and local regulation. Construction employers performing publicly funded work would find it difficult to reconcile the conflicting regulations applicable to their fringe benefit programs, which would adversely impact the growth of ERISA plans.

S. 1580, as introduced in the Senate, would conflict with the Administration's goal of improving the skill levels of the entire workforce and of increasing apprenticeship and training opportunities, especially for minorities, women and youth. S. 1580 would strike a devastating blow to the construction industry's ability to provide an adequately trained workforce.

With respect to ERISA preemption of state mechanics lien statutes as remedies for delinquent benefit fund contributions, AGC again supports the consistent application of ERISA preemption in the courts. Electrical Workers Health and Welfare Trust v. Marjo Corp., Nos. 91-16150, 91-16581 and 91-16610 (CA 9, March 16, 1993).

AGC opposes S. 1580 as both unnecessary and counterproductive in achieving the public policy goals underlying the Employee Retirement Income Security Act. Thank you.

Senator WOFFORD. Thank you all very much.

Would Mr. Hudacs or Mr. Ray like to comment on the minority and women participation in apprenticeship programs that you are familiar with, and also the rate of completion of the program and such?

Mr. HUDACS. If I may, the goals and the objectives that were cited, you will find no disagreement with whatsoever on my part with regard to the issue of portability, with regard to the issue of strengthening affirmative action as it relates to apprenticeship programs, as it relates to increasing the presence of not just minorities, but women, in the apprenticeship program, the broadening of the application of the apprenticeship programs into additional occupational clusters—not just the building trades, but expanding it. These are goals and objectives which we are very, very much committed to.

As a matter of fact, the total direction of what we are doing with regard to our apprenticeship program is targeted toward the expansion in the building trades of affirmative action and also in the other occupational clusters. We have over 300 occupational titles that we have apprenticeship programs for.

The issue is not a disagreement on the underlying objective, as was stated here. The problem I have is this is much akin to doing eye surgery with a shotgun. The relevance of ERISA to solving these problems needs to be understood in the context of the attendant difficulties and problems it creates. It is not the tool to achieve these goals, from my perspective.

The types of achievements that we have been able to realize in my State have been done mainly because we have the authority, and we have a system that allows us to do things that are no longer as clear to us that we are allowed to do, and we are constantly being challenged legally on.

We have 1,200 apprenticeship programs in our State. Over 770 of those are nonunion. In the building trades, we have 508 apprenticeship programs, and 280 of those are nonunion. Most of these nonunion programs are small programs. A larger number of apprentices are in the union programs. But we do not make a distinction between union and nonunion.

In terms of affirmative action, 25 percent of all of the apprentices are minorities. The recent apprenticeship classes that came in in

the building trades in 1993—we had 4,500 overall, but 2,400 of those were in the building trades—over 55 percent of those were minorities.

The types of efforts and initiatives we are trying to achieve, that I think are very much comparable to what was stated here, are considerably challenged in terms of our authority and ability to do those on the basis of this ERISA preemption. There are other devices available that should be used. There are people who should be held accountable for what they should be doing in order to achieve these goals. But using ERISA to achieve these goals is exceptionally detrimental and creates problems far beyond what I think anyone would have envisioned in the first instance when you are trying to find a solution to a problem.

Senator WOFFORD. Do you have any figures comparing the participation of minorities in union and nonunion programs in your State?

Mr. HUDACS. The bulk of the apprentices—because the union programs are large programs—out of the 15,300 apprentices, 3,000 of those are in nonunion. So the vast majority of the apprentices are in the union program, as are the numbers I mentioned, where we have 25 percent minorities; they would be in the union programs predominantly, because of the size of those programs.

Senator WOFFORD. Mr. Ray?

Mr. RAY. Senator, I am sorry, I think you asked me join with Commissioner Hudacs' response to your question.

Senator WOFFORD. Yes, go ahead.

Mr. RAY. I think Commissioner Hudacs has hit the nail on the head with respect to the issue of apprenticeship in this bill. We have heard lots of complaints about the apprenticeship council in California or the apprenticeship council in the State of Washington. All of those complaints related to those particular State apprenticeship councils can be resolved under existing law.

What my colleagues to the left—on my left geographically, if not politically—want is to have the Federal Government dictate to every State what the apprenticeship standards will be. They want to knock the States out of the role that they have traditionally played, long before the Federal Government, in regulating apprenticeship. And they are trying to use ERISA preemption, a technicality which has nothing to do with the regulation of apprenticeship standards, as the way to knock the States out of their traditional role.

If my colleagues to the left here want to seriously have Congress look at the national apprenticeship system that has been in effect for 55 years, then they should seek congressional sponsorship of a bill to amend the Fitzgerald Act, in which context we can have a debate about whether the Federal Government should preempt, should change this 55-year-old system and preempt the States. That is the proper context in which to have this debate, not over ERISA preemption which, as Commissioner Hudacs said, has nothing to do with what we are talking about or what the complaints on the left side are.

Mr. Thierman is an excellent attorney. He has found in Section 514 of ERISA the magic bullet that has killed the apprenticeship system in State after State—but he has not killed it on the basis

of the substantive apprenticeship standards; he has killed it on the basis of ERISA preemption, which Congress never intended to have anything to do with the regulation of apprenticeship standards. And I commend Commissioner Hudacs. He has hit the nail on the head.

Mr. THIERMAN. Could I respond? First of all, the Nevada ABC, the northern Nevada apprenticeship program that was approved by the court in McDonald has the highest minority participation of any program in the electrical industry in Nevada. The ABC southern California program is far ahead of the IBEW program in terms of percentages.

But let us not be confused. If you have a 30 percent apprenticeship minority participation, and you are only training 10 people, then you are only having three minorities. If you have 250 people, and you are only training 20 percent, you have got more minorities in the system. And that is what is going on.

We are through BAT. We are developing with the Indians their apprenticeship program. We believe in training as much as anybody else. In fact, let me talk to you about the difference in the standards, because we always keep talking about these standards. We copied their standards. I went down and copied them. I xeroxed them. They are identical. You cannot tell a word different, except for wage rates on private works. And the only reason we have those differences on private works only is because in order to keep the apprentice working, in order for the contractor not to switch to a laborer, which he will do, we need to have a more realistic wage rate on private work that reflects the private market, so we will use an electrician apprentice instead of a laborer, so we will use an operating engineer apprentice instead of a nonapprentice truck driver or whatever.

Let me respond to the issue of ERISA preemption. In the lower courts in Nevada, the judge said it is preempted by the Fitzgerald Act and ERISA. The Ninth Circuit in McDonald never got to the Fitzgerald Act. Judge Pollack, who decided the ABC Southern California case in the lower court, stayed away from ERISA preemption and said it was unlawful. Judge Pollack is a San Francisco liberal Democrat who wants to see people put to work when there is an opportunity.

We are not looking for the quote "silver bullet" that is going to put apprenticeship out of business. There are some 27 or 28 requirements in the Fitzgerald Act for a program, and those are the ones that the Federal court in McDonald and the State court in ABC Southern California said should be applied by the States. The last criterion of those 27 some-odd requirements is any other rule the State thinks is necessary and approved by BAT.

So do not tell me they do not have the right to pass a rule. They just cannot formulate a rule that is going to keep out nonunion people and sound nondiscriminatory. That is what is going on.

And by the way, the people who are approving these program in BAT are all former vice presidents of building trades unions. We are not talking about nonunion people. We are talking about former union people saying, "We need training. The mission is training. I will approve programs that meet the educational standards, that meet the hour requirements, that meet all the 27 cri-

teria." And the reason California and Washington and other States are now approving programs from the West is because if they do not approve them, the BAT will approve them; and if the BAT approves them, we go into court and ask, "How come you denied us?" and they cannot think of a reason. They are the same programs.

That is what we are talking about. And yes, I will agree that in Pennsylvania, we had a judge in the lower court—we have not gotten to the appellate court yet—who threw out the whole law, saying they are inseparable. Now, I do not know what kind of separability clauses you guys write in Pennsylvania, but what he did was say I cannot deal with those, and you go back and rewrite it.

I am sure that if you came out with a prevailing wage statute in Pennsylvania that says you have got to pay the total package, and that is the total package determined by including benefits in and then taking them out from when they are paid—whatever goes in comes out, and not this line item by line item stuff, or this two-tier stuff—that it would pass constitutional muster under ERISA preemption.

Mr. RAY. Mr. Chairman, could I add a point, if I may, because I think we have strayed a bit from——

Mr. GARCIA. Mr. Chairman, equal time, please.

Senator WOFFORD. All right. Let us allow Mr. Garcia to speak first.

Mr. RAY. Certainly, Mr. Chairman.

Mr. GARCIA. Since we are exercising equal opportunity here. Just a point of clarification for Mr. Ray's behalf. In 1937, the Shelley-Maloney Act was enacted following the National Apprenticeship Act, so that in California what you mentioned does not apply.

Second, believe me, if it will assist us and provide open shop contractors any apprenticeship opportunities in finding the California Apprenticeship Council, we will certainly take advantage of any technicality or whatever it takes, just so that we can provide our open shop contractors an opportunity.

And by the way, nobody has addressed the issue that these open shop contractors are also taxpayers. That is something that used to bother me when I was with the State of California, that here we were serving 25 percent of the population of contractors when the rest are also taxpayers, and we were actually a unit that strictly provided services for the union contractors. I do not think that is right.

Senator WOFFORD. Mr. Ray.

Mr. RAY. Thank you, Mr. Chairman. With regard to the minority representation issue, I would just like to remind the chairman of what Senator Specter said during his opening comments. Senator Specter drew the subcommittee's attention to a General Accounting Office report of March 1992, which very clearly sets forth that the trades are doing very well with regard to minority representation, and that in fact, in labor-management apprenticeship programs, we have a much better record of graduating minorities than nonunion organizations have.

Second, with respect to the home State of my colleagues to the left here, I would like to call the chairman's attention to a letter that was sent to the full committee chairman yesterday by an organization from San Francisco called Equal Rights Advocates—it is

a letter signed by the managing attorney—in which that organization, which exists for the purpose of advocating the advancement of women and minorities in apprenticeship programs, expressed support to Senator Kennedy for the legislation before you, saying that in fact, contrary to the claims made by my colleagues to the left, this legislation would advance the cause of women and minorities in the construction industry.

There is nothing that my colleagues to the left can point to in this legislation that precludes women and minorities from apprenticeship. We stand as building trades on our record, which is documented by the Government. And of course, we should point out that the Bureau of Apprenticeship and Training regulations require that equal opportunity efforts be made by all approved apprenticeship programs.

Mr. THIERMAN. Exactly. BAT regulations, BAT guidelines work. States play around with them.

Let me submit for the record—I do not know how to do this; we do it in court by marking it, but I do not know what you do here—"A Little Hoover Commission" by the State of California, written by a former union contractor and a committee that says basically, the system of denying access to apprenticeship to new programs has the effect of encouraging discrimination. And this is the Little Hoover Commission, dated January 22, 1992, by the State of California, directed to the Department of Industrial Relations.

The fact is that we want affirmative action, we want to participate in the process. It cannot be just the unions. They do not have a monopoly on training—because you know, really, when all is said and done, what we are talking about is training people who then go out and pay taxes. And I would rather see people on the tax rolls than on the welfare rolls. And I do not care what card they hold, and I do not care what club they belong to. If they want to organize those people, and they want to represent those people, have at it. But let us get them through the system so they do not sit on the street corners and do drugs and do other things because they cannot get a job.

Construction is a well-paying, well-respected—or should be better respected—profession, and it is a good career for people. And if you want to talk about the United States' productivity, if we cannot build factories, if we do not have the technical know-how, if we do not have the crafts people, those factories are going to go offshore, and we are all going to lose. So let us stop acting like the Commonwealth of XYZ, or the feifdom of ABC, or whatever, and let us sit down and do some national standards, and if there is a real problem with the curriculum, and if there is a real problem with the number of hours of instruction, if there is a real problem, let us fix it, and let us have a national standard of excellence instead of bickering over this is my territory, and this is your territory, and I got here first.

I do not know how you mark this.

Senator WOFFORD. We will include it in the record.

[Information of Mr. Thierman appears at the end of the hearing record.]

Mr. RAY. One final brief point, Mr. Chairman, if I may. We have heard lots of complaints against the California State Apprentice-

ship Council. I just think the record of the subcommittee should reflect that the members of that apprenticeship council are appointed by the Governor, and the last time I looked, there was a Republican Governor in that State who is not well-known for protecting the interests of union versus nonunion business interests.

Mr. THIERMAN. And because Federal law requires equal representation of unions on those councils. Federal law requires it, 50 percent union. If you take away this preemption issue, that Federal law does not apply. I do not know what the next Republican Governor is going to appoint. Maybe it will be all nonunion people.

Senator WOFFORD. Could you explain to me what the problem has been in terms of the completion of ABC's training programs? I noted in your ABC v. Curry case that between 1982 and 1990, no trainee completed any of the training programs.

Mr. THIERMAN. That is right, and the reason is—and I will be very honest with you—the reason is because if you cannot use an apprentice on public works—and most public works with revenue-sharing is State-controlled—then you do not need an apprenticeship program. You will go out and hire someone, and you will put him in night school, or you will put him in a course for a few weeks, or you will hire someone else, and you will throw him away when the job is over, or you will basically get rid of that person if he is asking too much money. There is no structure, and there is no reason to have a structure.

There is a carrot and a stick. The carrot is public works access. The stick is regulation. We will deal with the stick. We will accept the stick if you give us the carrot. We had a BAT program, could not use them on any State prevailing wage work; as soon as the standards got too expensive—in other words, the electrician was getting $15 or $20 more than a journeyman for being an apprentice—the contractor would let the person go, or he would do one thing, and he would do that so well that he would not complete the course because the contractor would not rotate him.

We are emulating their system. We are acting like they do. And the only way we are going to continue to do that is if we are benefited or have access to these public works jobs. And that is what we are asking for.

One other point. We are beating this Hydrostorage dead horse a lot. Hydrostorage is an old case. McDonald actually pulled back. McDonald said you go with the Federal rules, using State enforcement mechanisms, and if those 27 rules are not broad enough to do the right thing, then you can go in on the 28th rule and say, "I want an exception." But we are going with the Federal rules and State enforcement. And the reason is because we will get consistency, and we will get uniformity, and we will assure nondiscrimination.

So the leading case is really McDonald, and the California U.S. Supreme Court case, Southern California v. ABC, and not the Hydrostorage decision.

Senator WOFFORD. Any other last comments?

Yes, Mr. Garcia?

Mr. GARCIA. Senator, yes, if I may. Certainly, I am not an attorney, and all the material that is written could be subject to my interpretation. But they have been testifying that ERISA was never

meant to regulate apprenticeship programs. The way I read it, nowhere in any statutory language is this stated. Quite to the contrary, ERISA clearly states that its preemptive power extends to employee welfare benefits, including apprenticeship and other training programs, 29 USC, Section 1002(1)(a).

So it clearly states that specifically.

There is one other minor comment that I would like to make. Mr. Ray mentioned about equal opportunity, and so on, mandated by the Federal Government. Yes, BAT has Section 29, Part 30, that requires all apprenticeship programs, even in the SAC States, to participate in equal opportunity. There is a California plan for equal opportunity that each program that is sponsoring an apprenticeship has to abide by, and there are certain commitments and timetables that we have to accomplish. That is the biggest joke you would ever want to see, sir, because it is accompanied by what is called a "good faith effort"—if you do this and this and this, then you have met compliance, regardless of whether you have brought in enough minorities or women. That stinks, sir.

Senator WOFFORD. Any other final comments?

Mr. THIERMAN. Could I supplement the record with this article entitled, "The Clogged Pipeline of Craft Training," in the Wall Street Journal, Tuesday, January 11, and specifically the quote by the Federal training official in San Francisco. It says, "David Turner, a Federal training official in San Francisco, is more guarded but says nonunion contractors could be able to double the approximately 180,000 apprentices in the industry now." That is 180,000 people working. I think that makes it worthy to re-look at this legislation to see what it really accomplishes.

The goals espoused, I do not think we are really fundamentally disagreeing on. I think it is the method, and the devil is in the details here.

Senator WOFFORD. Without objection, it will be included.

[Article from the Wall Street Journal appears at the end of the hearing record.]

Senator WOFFORD. Also, the State of Washington Department of Labor and Industry has submitted testimony. A letter from Equal Rights Advocates, San Francisco, CA; a statement of Representative Howard Berman of California; a statement of Senator Thurmond and several questions; a letter from the National Association of Government Labor Officials, and a statement from Senator D'Amato will be entered into the record.

[Documents referred to appear at the end of the hearing record.]

Senator WOFFORD. I want to thank you very much. We will be looking forward to working in the full committee on this issue as we move forward with the legislation. Your views are going to be very important to us.

Thank you.

PREPARED STATEMENT OF SENATOR WELLSTONE

Thank you, Chairman Wofford, for your work on this legislation so important to America's working people. I understand this issue has caused very serious problems for working people in your state. Your efforts, and those of Senators Metzenbaum and Kennedy, have been key to pushing this measure forward.

This bill is designed to address a very complex set of questions about state laws under the Employee Income Retirement Security Act. The original intent of ERISA was to protect the livelihoods and retirement incomes of American workers. But many of these protections have been eroded by over a decade of federal and Supreme Court decisions which have allowed employers (and their insurers) to use ERISA as a tool to avoid their obligations to their employees under various state laws.

It is true that ERISA contains one of the broadest pre-emption clauses of any federal statute, preempting all state laws that pertain to employee benefit plans. Recent federal court decisions, however, have construed the term "employee benefit" so broadly that it now encompasses many kinds of employee benefits only tangentially related to ERISA's original intent, including apprenticeship programs, prevailing wage laws, antidiscrimination guidelines, and others.

These state laws are designed to prohibit discriminatory workplace practices or to require payment of prevailing wages or participation in state-approved apprenticeship programs necessary for state licensing of certain crafts. Some federal courts have held that ERISA supersedes any state law with "a connection or reference to" an employee benefit-plan. Of course, ERISA was intended to cover primarily pension benefits, and is only very tangentially related, if at all, to these many other areas properly regulated by state statutes.

This bill addresses this pre-emption problem in several key areas, including prevailing wage and apprenticeship laws. These two have been especially effective in my state, and their preemption has caused serious problems. It is time for Congress to clarify our intention in this area of the law.

I have stayed in touch with my Attorney General Skip Humphrey during the last two years, who has conveyed to me the scope and seriousness of this pre-emption problem. I have also heard from many workers in my state. I will submit for the record a statement and detailed analysis from Attorney General Humphrey of state laws that have recently been struck down by the courts under these very expansive interpretations of the pre-emption clause. I encourage my colleagues to consider carefully this list of pre-empted state statutes—many having nothing at all to do with pension plans—as we move forward on this bill.

Now, I am sensitive to the difficulties which would be posed by a more substantial limitation on the reach of ERISA's pre-emption clause. I agree wholeheartedly with the original intent of ERISA's pre-emption clause,

PREPARED STATEMENT OF SENATOR THURMOND

Mr. Chairman, it is a pleasure to be here this afternoon to receive testimony concerning S. 1580 and ERISA preemption of State prevailing wage laws. I would like to join my colleagues in welcoming our witnesses here today. I would especially like to extend a warm welcome to the able Senator from Pennsylvania, Senator Specter.

As you know, S. 1580 would prohibit the federal pension and welfare benefits law from preempting: (1) state prevailing wage laws, (2) state apprenticeship laws, and (3) state mechanics liens laws.

As you also know, state laws have been struck down by courts on the basis of ERISA preemption because they were inconsistent with established federal policy. That federal policy protects workers' health benefits, retirement benefits, and job training opportunities and ensures consistent enforcement of violations. This legislation will impose new and inconsistent state regulations in areas successfully governed by federal standards.

Under this legislation, state prevailing wage laws can be passed that do not give companies full credit for the benefits they provide, even if those benefits exceed what a state determines is prevailing. As a result, companies may be forced to provide fewer and less generous benefits.

The problems with these prevailing wage issues can be resolved at the state level. There is no need to change the ERISA preemption law in the prevailing wage area.

Mr. Chairman, S. 1580 would allow inconsistent remedies for enforcing ERISA violations. State mechanics liens and other remedies may be used by multi-employer plan trustees to obtain plan contributions. This would thwart ERISA policy, which is to ensure consistent enforcement against mobile contractors and multi-state employers.

Again, it is a pleasure to be here this morning, and I look forward to hearing from our witnesses.which was to avoid a patchwork of inconsistent state administrative requirements on multistate plans. Without such a pre-emption, multi-state employers could be discouraged from providing certain benefits in the first place.

Throughout our deliberations here in Congress, we should keep in mind that our goal should be to restore ERISA to its rightful place as a law which protects working people. The eighty million American workers who are protected by employee benefit plans, and the many millions more who are not, are in need of the protections this bill affords. I urge my colleagues to support this measure.

PREPARED STATEMENT OF SENATOR D'AMATO

Mr. Chairman, members of the committee, I would like to thank you for convening this hearing on legislation to clarify Congressional intent with regards to ERISA pre-emption. I know that the Committee has many other pressing matters to which it must attend, however, the willingness to move forward with these hearings demonstrates the urgent need for this legislation.

Misinterpretations of the application of the Employee Retirement Income Security Act, or ERISA, have had dramatic effects on state prevailing wage, apprenticeship, and mechanics' lien laws in many states throughout our nation. A prevailing wage situation in my state of New York and a similar situation in Pennsylvania led my colleague, Senator Specter, and I to introduce this legislation last October.

Mr. Chairman, I know you have assembled a collection of able and knowledgeable witnesses who can speak eloquently and with painstaking detail as to the reasons why this legislation is necessary. But the real and simple reason for this bill is that it re-establishes fairness for workers.

New York's prevailing wage law was established almost one hundred years ago in order that workers on public work projects would be able to receive the same or similar wages paid to private workers in the same area. This long-standing tradition has ensured that state projects are built to exacting standards by skilled professionals.

Over time, New York included into its prevailing wage law health, pension, and welfare benefits as a trade-off for wage increases, or in lieu of such benefits, a minimum cash equivalent. This arrangement was ideal as it allowed employees decent wages as well as much-needed benefits. However, all this changed after the decision by the 2nd Circuit Court of Appeals in General Electric v. New York State Department of Labor. The Court allowed the broad scope of federal ERISA to preempt the ability of New York to govern its own public works projects with respect to wages and benefits.

Under the Court's decision, New York contractors who adhere to prevailing wage and benefit practices are at a distinct disadvantage to those contractors who do not. In many cases, New York contractors, a number of whom have already entered into collectively bargained arrangements, can be undercut by non-local contractors who may offer substantially lower wage and, if they so choose, benefit packages. Because of this decision, New Yorkers face the loss of job opportunities that should rightfully be theirs. That is wrong.

No one disputes the need to protect workers from unscrupulous employers. However, when a state law such as New York's, that is tried and true, goes above and beyond the minimum protections established by ERISA, then it does not make sense to supersede that law. While that is what the decision in GE v. New York State accomplished, it is not what I believe the original authors of ERISA intended. The motives of Congress have been misconstrued and unless we clarify those intentions, it will be the middle class working men and women who will continue to suffer.

We must return to a rational policy of prevailing wage rates on state public works projects. The elimination of New York's ability to regulate its own well-established and highly successful prevailing wage and benefit rates is not consistent with the original intent of ERISA and leaves New York workers without hope or opportunity. It is a matter of fairness, Mr. Chairman, that we give back to our workers nationwide the security that they once possessed.

While the legislation that Senator Specter and I introduced tackles the prevailing wage problem in New York and elsewhere, it also addresses the effects of ERISA's reach on the ability of state's to regulate apprenticeship training programs and provide for mechanics' liens. As with prevailing wages, apprenticeship and mechanic lien statutes have been pre-empted because they relate to ERISA, not because they conflict with ERISA. That was not Congress' intent and our legislation seeks to delineate that concern.

Mr. Chairman, this is, at first glance, a complex issue. However, after some time and study, the bottom line becomes clear—our nation's workers are being put at a disadvantage due to misinterpretations of federal law. We have the ability to restore some measure of security back into their lives with the passage of S. 1580. Once again, I thank the Committee for holding hearings on this important measure and I look forward to this legislation being brought to the floor of the Senate in the near future. Thank you.

PREPARED STATEMENT OF CONGRESSMAN HOWARD L. BERMAN

Mr. Chairman, as the author of the House-passed H.R. 1036, I urge my colleagues to support this important legislation and Senate counterpart legislation, S. 1580. The purpose of this legislation is simple: to restore the right of states to protect their workers in three critical areas: prevailing wages, apprenticeship and training, and remedies for the collection of delinquent plan contributions.

I view these bills as narrow legislation intended to clarify that Section 514 of ERISA, the preemption provision, was never intended to preempt state law in these three areas.

Section 514 provides that with certain exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

I think my colleagues would be amazed to learn, as I have, the range of state laws that have been invalidated on the basis of that short sentence—in areas where Congress has never purported to legislate! Relentless efforts have been made to overturn an array of state laws establishing labor standards and other protections for workers. As a former state legislator myself, as are so many of my colleagues, I am well aware of the case that was made on behalf of state legislation in those areas-and consequently the tremendous harm resulting to workers as a result of ERISA preemption.

I know firsthand from my discussions with California workers the price they have paid and will continue to pay as a result of preemption of (1) state prevailing wage laws1 (2) state law establishing standards for apprenticeship programs, and (3) state laws providing remedies or means for collecting contributions to multiemployer

plans. I am convinced that the harm caused by the interpretation of ERISA as to these issues is so significant that action on our part is required.

On the issue of state prevailing wage law, certainly the interest of the state in establishing minimum standards for employment on publicly funded or assisted projects should be clear. The 31 states that have enacted state prevailing wage laws have, in so doing, acted out of an interest in setting the terms on which they will do business with contractors.

But in 1989, the Second Circuit in General Electric v. New York State Department of Labor invalidated the fringe benefit provisions of New York's prevailing wage law.

The notion that Congress would willfully bar the states from enacting and enforcing laws effectuating state interests in an area which ERISA does not in any way lay claim to cover, is a strange one to me. I cannot believe that this was the intent of Congress in enacting ERISA, and that is why prevailing wage laws are the first of three issues addressed by the bill.

With regard to the second type of state worker protection laws addressed by H.R. 1036, every one of the 50 states has enacted laws setting standards for the certification or training of apprentices. States have a patent interest in the development of a skilled workforce, capable of performing in real jobs and likely to guarantee safer workplaces. This is the basis of state regulation of employer conduct in the establishment and maintenance of apprenticeship programs—and it is fully consistent with the federal-state scheme of the 50 year old Fitzgerald Act.

ERISA certainly does not purport to set standards for apprenticeship programs. Yet in Hydrostorage, Inc. v. Northern California Boilermakers, the Ninth Circuit in 1989 invalidated California apprenticeship standards on ERISA preemption grounds.

In this area, too, we see state laws that have in many instances been on the books for decades thrown out on preemption grounds, leaving a vacuum in their wake, and in essence nullifying the Fitzgerald Act. H.R. 1036 provides essential clarification on this issue, as well, spelling out that ERISA does not preempt state law establishing apprenticeship program standards, making certified or registered apprenticeship or other training an occupational qualification, or regarding the establishment, maintenance, or operation of apprenticeship programs.

The third and final element of H.R. 1036 provides that ERISA does not preempt state law providing additional remedies or means for collection of contributions to multiemployer plans.

It is quite clear to me that preservation of state collection remedies was explicitly intended by Congress to be an integral part of the ERISA scheme for assisting plans in collecting contributions. Congress reaffirmed this intention in the Multiemployer Pension Plan Amendments Act of 1980. Yet in Carpenters Southern California Administrative Corporation v. El Capitan Development Company, the California Supreme Court invalidated California mechanics lien law on ERISA preemption grounds.

There is a long history of bipartisan support for effective means of maintaining the fiscal integrity of multiemployer plans. There is certainly no disagreement among plan trustees on this issue; to the contrary, state remedies and means for collecting unpaid contributions simply provide fiduciaries with the necessary tools to protect the plans for which they are responsible. Yet the El Capitan case—and the Fifth Circuit decision in the Iron Workers Mid-South Pension Fund case—have severely undermined the fiscal soundness of many plans. We must take action.

Every one of the issues addressed by my legislation was raised first with me by my constituents. And the concerns they have raised have stood the test of time.

State labor standards and remedies that have been on the books for decades have been wiped out; lower court cases which were first brought to my attention several years ago have not been reversed.

These cases certainly do not square with my notion of federalism, and I suspect that they are at odds with all of the rhetoric heard regularly about returning government to the people at state and local levels.

Where federal law spells out rights and remedies in the interest of protecting Americans and promoting uniformity of our laws, then indeed preemption is in order. But in the cases I have outlined, our courts have invalidated vitally important state laws on matters to which ERISA does not purport to speak.

We cannot allow this situation to stand, and that is why I urge enactment of H.R. 1036.

PREPARED STATEMENT OF ATTORNEY GENERAL HUBERT H. HUMPHREY III

Thank you, Mr. Chairman, and thank you, Senator Wellstone, for inviting me to submit a statement on H.R. 1036, the ERISA Preemption Amendments of 1994. My name is Hubert H. Humphrey III, and I have been the attorney general of the State of Minnesota since 1983. During this past year, I have also had the privilege of serving as the president of the National Association of Attorneys General (NAAG).

The issue before this committee is extremely important, both to the states and to the working people of this country. As all of you know, the Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect employees from the abuse and mismanagement of employee benefit plans and to protect them from failure to pay promised benefits. Now, however, because of a decade or so of ill-advised court decisions, ERISA has instead become a tool for employers who wish to avoid their obligations under state law. The problem is ERISA's preemption clause, which provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

The purpose of the preemption clause was to encourage multistate employers to set up employee benefit plans by "ensuring that the administrative practices of a benefit plan will be governed by only a single set of regulations." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11, 107 S.Ct. 2211, 2217 (1987). What has happened, however, is that the courts have adopted a much more expansive interpretation of ERISA's preemption clause and have held that ERISA supersedes any state law that has "a connection with or reference to" an employee benefit plan. Shaw v. Delta Air Lines, 463 U.S. 85,97, 103 S. Ct. 2890, 2899 (1983). Based on that reading of the statute, the Supreme Court has, on ERISA preemption grounds, struck down the following:

—State laws requiring employers who provide health insurance for their employees to provide equivalent coverage for injured employees eligible for workers' compensation benefits, District of Columbia v. Greater Washington Board of Trade, 113 S. Ct. 580 (1992);

—State laws that prohibit employers from discriminating against employees in order to interfere with their pension rights, Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990);

—State laws prohibiting insurers from asserting subrogation rights against an insured, at least to the extent those laws might apply to employee benefit plans, FMC Corp. v. Holliday, 111 S. Ct. 403 (1990);

—State laws that exempt employee benefits from garnishment, Mackey v. Lanier Collections Agency & Service. Inc., 486 U.S. 825, 108 S. Ct. 2182 (1988);

—State laws which give beneficiaries a cause of action against employee benefit plans or their insurance company administrators for bad-faith misconduct, Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549 (1987);

—State laws which require self-insured employee benefit plans to provide certain minimum benefits, Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 105 S. Ct. 2380 (1985) (mental health benefits); Shaw, 463 U.S. 85, 103 S. Ct. 2890 (1983) (pregnancy benefits); and

—State laws prohibiting the setoff of workers' compensation benefits against pension benefits, Alessi v. Raybestos-Manhattan. Inc., 451 U.S. 504, 101 S. Ct. 1895 (1981).

The federal circuit courts have, in turn, expanded the reach of ERISA preemption even further. Our own Eighth Circuit is typical. In Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital. Inc., 947 F.2d 1341 (8th Cir. 1991), cert. denied, 112 S. Ct. 2305 (1992), the court all but encouraged plaintiffs to bring ERISA preemption challenges to any state law, so long as there is evidence that the state law might have some economic or other impact on ERISA plans or might affect their administration in some way. Needless to say, almost every state regulation that governs the relationship between employers and employees has now become the possible target of an ERISA preemption challenge. Even when the states prevail, the costs and uncertainty involved can be enormous, and just the threat of ERISA litigation has already prompted officials in Minnesota and other states to simply decline to enforce laws that are on the books. Only Congress can provide the clarification that is necessary to let the states perform their traditional functions.

That is particularly true with respect to the three areas this bill addresses: state prevailing wage laws, state apprenticeship and occupational licensing regulations, and state mechanics lien statutes. In Minnesota, we have confronted ERISA problems on all three issues, but, in this statement, I would like to focus on the prevailing wage and apprenticeship issues because those are the questions on which my office has the most direct experience.

1. Prevailing Wage Laws

As you know, thirty-one states have laws that require contractors to pay prevailing wages on public works construction projects. All of these laws are modeled to some extent on the federal Davis-Bacon Act, 40 U.S.C. Sec. 276a, and all have the same goals. The preamble to Minnesota's statute is typical:

It is in the public interest that public buildings and other public works be constructed and maintained by the best means and highest quality of labor reasonably available and that persons working on public works be compensated according to the real value of the services they perform. It is therefore the policy of this state that wages of laborers, workers, and mechanics on projects financed in whole or part by state funds should be comparable to wages paid for similar work in the community as a whole.

Minn. Stat. Sec. 177.41 (1992). The law's objective is to ensure that state government, with its considerable purchasing power, does not become a factor in lowering area wage standards. Some have argued that these laws unnecessarily inflate construction costs, but the better economic research has indicated that, because of productivity differentials, the cost impact of prevailing wage requirements is negligible, but the economic benefits are substantial. See generally Walter, The Economic Impact of Prevailing Wage Requirements in Minnesota, Industrial Relations Center, Carlson School of Management, University of Minnesota (1992).

To date, eight state prevailing wage laws have faced ERISA preemption challenges. In three states—New York, Pennsylvania, and Iowa—the prevailing wage statutes have been struck down. General Electric Co. v. New York State Department of Labor, 936 F.2d 1448 (2d Cir. 1991); Keystone Chapter. Associated Builders and Contractors v. Foley, 837 F.Supp. 654 (M.D. Pa. 1993); City of Des Moines v. Master Builders of Iowa, 498 N.W.2d 702 (Iowa 1993). In two states—Oregon and Minnesota—the statutes have been upheld, but Minnesota's case is on appeal to the Eighth Circuit. Bloom v. Tigard Electric. Inc., No. 91-1315-MA (D. Ore. 1992); Minnesota Chapter. Associated Builders and Contractors v. Minnesota Department of Labor and Industry, Civ. No. 4-92-564 (D. Minn. April 27 and Nov. 4, 1993). In California, Michigan, and Ohio, the cases are still pending in district court. W.S.B. Electric. Inc. v. Curry, No. 90-16543 (C.D. Calif.); Saginaw Valley Area Chapter v. Perry, No. 93-CIV-10016-BC (N.D. Mich.); Stozich v. Tower Place Limited Partnership, No. C1-93-509 (S.D. Ohio).

In every one of those cases, the argument has been basically the same. Like Davis-Bacon, state prevailing wage laws typically set wage targets for various occupations, and provide that "wages" include, as it says in Minnesota's law, "the hourly basic rate of pay plus the contribution for health and welfare benefits, vacation benefits, pension benefits, and any other economic benefit paid." Minn. Stat. Sec. 177.42, subd. 6 (1992). If, for example, the prevailing wage rate for a carpenter is $21 an hour, the law requires that the total wage and-benefit package total $21 an hour; the state is not concerned with allocation between straight pay and fringe benefits.

Nevertheless, what the courts have been told and, unfortunately, what many of them have concluded is that, since these prevailing wage laws mention employee benefits, they are automatically preempted by ERISA, even though the laws have no impact on employer decisions as to what employee benefits to offer. Our lawyers call that "flashcard justice"; more than one judge has observed that ERISA has prompted the federal courts to "check their common sense at the door."

The Congress that passed ERISA to protect working people did not intend to strike down state prevailing wage laws any more than it intended to repeal Davis-Bacon or any other minimum labor standard. All this bill does is restore the original intent of Congress, and restore the traditional prerogative of state governments when it comes to their own contracts. Moreover, in the version that ultimately passed the House, the bill is carefully drafted to ensure that states do not use their prevailing wage laws to insist on a particular package of fringe benefits, but instead continue their present practice of simply setting flat wage-and-benefit targets and leaving it to employers and employees to determine the wage-benefit mix.

2. Apprenticeship, Training, and Occupational Licensing

Everyone agrees that, if the U.S. is to compete in the global economy, we need to enhance the skills of our workforce. Consequently, every state in the union has long had a program in place to encourage and to set minimum standards for apprenticeship and training programs. That has likewise been federal policy since the Fitzgerald Act was enacted a half-century ago. In addition, every state in the union imposes licensing requirements on various occupations to ensure that the public is well served.

Again, however, as with state prevailing wage laws, ERISA preemption has threatened those state programs as well. The argument in these cases is that, since apprenticeship and training programs are among the benefits employers can provide with ERISA plans, any state law, again, that mentions the words "apprentice" or "trainee" is automatically preempted.

In Minnesota, we have had to deal with a particularly egregious decision that has threatened the viability of many of our occupational licensing laws. The case is Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991), cert. denied, 112 S. Ct. 3014 (1992), which involved licensing of high-pressure pipefitters. Because of the risk to the public if high-pressure piping systems are improperly installed or maintained, Minnesota has long required that pipefitters be licensed. Since pipefitting is the kind of skill one learns by doing, however, Minnesota's licensing law had long permitted the use of apprentices or trainees on these projects.

Beginning in the 1980's, however, the State found that that privilege was being abused. Contractors were completing piping projects with one licensed pipefitter and ten or twelve "trainees," obviously with the goal of circumventing the intent of the licensing law. Consequently, the State responded by imposing a ratio requirement that, for the first trainee on a project, there be at least one licensed pipefitter, and then for every trainee after that, there be at least three licensed pipefitters on the site.

The court struck down that rule on ERISA preemption grounds, "reasoning" that, since the state rule mentioned trainees, it was preempted. (The contractors had contended that the rule impermissibly interfered with their selection of a proper teacher/student ratio.) Since that time, similar provisions in our state electrical code and in new regulations involving fire sprinkler installation have been enjoined by the courts on the same grounds.

The Boise case is important because it shows the lengths to which the courts have been ready to take the ERISA preemption argument. That case had absolutely nothing to do with the approval of apprenticeship or training programs, with the concern that state apprenticeship councils have somehow been "captured" by organized labor, or indeed, with the content of apprenticeship or training programs. Nevertheless, because the word "trainee" appeared in a state law, the courts were prepared to strike it down, whether that result made any sense or not.

To the extent that members of this committee or other members of the Senate are concerned about the quality of state apprenticeship programs, I think it is absolutely appropriate that Congress consider legislation to create greater apprenticeship opportunities for minorities, for women, and for young people. I am an enthusiastic supporter of "school-to-work" programs, and I think the needs of our non-college-bound young people have been sorely neglected.

Allowing ERISA to, in effect, throw out the baby with the bathwater is, however, precisely the wrong approach. We in Minnesota have been forced by the federal courts to leave the public at greater risk than before because we have had our traditional authority to determine minimum occupational standards curtailed. Obviously, that is not what Congress intended when it passed ERISA; it should not be what Congress intends today.

The National Association of Attorneys General strongly endorses this measure, and it does so by bipartisan consensus. The bill is well-drafted, it is narrowly tailored, and it will do much to restore the ability of the states to protect both working people and the public. I urge you to pass H.R. 1036.

TESTIMONY OF ROBERT A. GEORGINE, PRESIDENT, BUILDING & CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

Mr. Chairman and Members of the Subcommittee:

My name is Robert A. Georgine. I have the privilege of appearing before you today as the President of the Building and Construction Trades Department of the AFL-CIO on behalf of the more than four million workers represented by the 15 national and international unions in the building and construction industry that are affiliated with this Department. Our members are employed on publicly financed building and construction projects, as well as private projects, throughout the country, and, therefore, are greatly affected by State prevailing wage laws and by State apprenticeship training and employment laws. Our members are covered by hundreds of Taft-Hartley multiemployer pension, health and welfare plans and, therefore, have a great interest in State laws that promote the effective collection of contributions needed to finance these plans.

Accordingly, I appreciate the opportunity to urge prompt Senate enactment of H.R. 1036 as passed by the House of Representatives by a bipartisan 276-150 vote on November 9, 1993. The bill would amend the Employee Retirement Income Security Act (ERISA) to expressly exempt from its preemption provisions State prevailing wage laws, State laws concerning apprenticeship training and employment, and State mechanics' lien laws and similar laws which provide means for securing and collecting multiemployer plan contributions.

I, and the organizations and workers I represent, are very grateful to you, Mr. Chairman, for the timely scheduling of this hearing and for your support for the bill. We are also grateful to Senator Harris Wofford, a Member of the full Committee, for his efforts on behalf of this legislation, which is so important to his State of Pennsylvania. As a former Secretary of Labor and Industry for that State, Senator Wofford is well-acquainted with the need for this legislation to restore these State laws from unintended ERISA preemption.

I also want to thank Senator Arlen Spector and Senator Alphonse D'Amato for sponsoring S. 1580, which is identical to H.R. 1036. Their support for this legislation underscores its bipartisan appeal and its importance to their States.

Overview: Reasons For Support of H.R. 1036

The urgent need for enactment of H.R. 1036 is well-documented in the Report of the House Committee on Education and Labor on this legislation.[1/] We respectfully request that this Committee take note of that Report, with which we agree. Given the comprehensive treatment of the problems in that Report, I will not consume your time by fully restating them. But, the impact of these problems on the standard of living and employment conditions of building tradesmen is so great that I am compelled to again briefly discuss them with you.

The Building and Construction Trades Department of the AFL-CIO and its affiliated unions strongly support and urge prompt enactment of this essential legislation for three principal reasons.

First, some Federal courts of appeal and district courts have stricken down portions of State prevailing wage and apprenticeship training and employment standards laws on the basis of ERISA preemption. These court decisions have created a devastating problem for our members, who depend upon these longstanding State laws to maintain area wage standards against undercutting by public projects and to encourage and protect the apprenticeship system that enables workers to develop the skills needed to perform quality building and construction work. There is a compelling and immediate need to reverse these harmful court decisions.

Second, these court decisions are inconsistent with the original intent of Congress in enacting ERISA. It was not ERISA's design to prevent State and local governments from determining the terms and conditions under which they purchase or otherwise obtain goods and services. Indeed, in an analogous situation, the Supreme Court has recently ruled that Federal labor law does not preempt a State agency from setting the otherwise lawful terms under which it obtains public construction services. Moreover, ERISA was not intended to repeal the States' role in the joint Federal-State system for regulating apprenticeship that has been in place since Congress enacted the National Apprenticeship ("Fitzgerald") Act of 1937.

Third, some Federal and State courts have ruled that ERISA's preemption provisions prevent our pension, health and welfare plans from continuing to rely upon State mechanics' lien laws, surety bond laws, and other State law means for collecting the collectively-bargained employer contributions needed to fund these employee benefit programs, even though these State laws remain available to all other creditors, and even though these contributions are an important part of a worker's compensation for his or her labor. These decisions have reduced workers and their pension, health and welfare plans to second-class citizenship when it comes to collecting debts owed to them. Congress never intended ERISA to have this effect. Indeed, ERISA's policy is to encourage maximum collection of employee benefit plan funding.

That a legislative clarification of ERISA's preemption provisions is necessary is a conclusion that I arrived at with some reluctance. The Building and Construction Trades Department has long been supportive of ERISA's broad preemption provisions. Because of the substantial damage caused in the building and construction industry by these court decisions, however, it is clear to me that remedial action by way of an additional narrow exemption from ERISA's preemption provisions is required.

State Apprenticeship Standards Laws

Since the 1937 enactment by Congress of the Fitzgerald Act,[2/] the promotion, protection and standards of apprenticeship have been a joint Federal-State responsibility. The Act directs the Secretary of Labor to "cooperate with State agencies

engaged in the formulation and promotion of standards of apprenticeship...." The directives of this briefest of Federal laws reflect Congressional recognition that the States had been regulating apprenticeship before enactment of the Act, and a Congressional intent that the States continue to play a key role in the regulation of apprenticeship training and employment. Under this law, States reserve exclusive regulatory authority over apprenticeship for State purposes (e.g., State tax credits or subsidies for employment of apprentices in State-certified apprenticeship programs). For Federal purposes (e.g., permitting the payment of lower wages to apprentices on Federal prevailing wage projects), consistent with the Act, the Labor Department's Bureau of Apprenticeship & Training (BAT) has formally recognized State agencies called State Apprenticeship Councils (SACs) in 27 States as having the exclusive authority to register and regulate apprenticeship programs in accordance with minimum BAT regulations and such additional standards as the SACs deem appropriate.[3/] The remaining States have chosen not to create SACs and regulate apprenticeship for federal purposes, leaving such regulation to the BAT.

In sum, in the words of Secretary of Labor Robert B. Reich to House Committee Chairman William D. Ford expressing Administration support for H.R. 1036:

> The regulation of wage and benefit levels on State public works projects and the establishment of standards for apprenticeship training have long been regarded as areas of State interest.[4/]

However, this joint Federal-State partnership mandated by the Fitzgerald Act is being demolished by recent court rulings misreading ERISA's preemption provisions as removing the States from their traditional role in the regulatory scheme for apprenticeship.

In Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. denied, 498 U.S. 822 (1990), the Ninth Circuit Court of Appeals held that ERISA preempts a State administrative order that requires employers on public works projects to meet State standards governing the number, training, and terms and conditions of employment of apprentices on such projects. The same court later ruled that ERISA preemption prevents a State Apprenticeship Council from setting apprenticeship training and employment standards beyond BAT's minimum standards, even with respect to purely State-financed projects. See Electrical Joint Apprenticeship Cmte. v. McDonald, 949 F.2d 270 (9th Cir. 1991).

These decisions have created a serious problem with respect to the administration and funding of apprenticeship programs in California. But, the problem is not limited to that State. The efforts of departments of labor in other States to maintain high standards for apprenticeship programs and to require apprenticeship ratios on public works projects have been similarly invalidated by the courts. For example, the States of Nevada, Washington, and Oklahoma have also seen aspects of their

apprenticeship standards laws stricken down on ERISA preemption grounds by courts. Minnesota's law is now under challenge in a Federal court of appeals after being upheld in a lower court.

All States with apprenticeship laws and regulations are adversely impacted by these court decisions, but especially the 27 States with Labor Department-approved SACs: Arizona, California, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, in addition to the District of Columbia and Puerto Rico.

The Federal Government lacks the resources to monitor the structure and operations of all apprenticeship programs nationwide. It relies upon the States, through the approved State Apprenticeship Councils, to perform much of this enforcement function. According to the General Accounting Office's March 1992 report entitled **Apprenticeship Training: Administration, Use, and Equal Opportunity**, the States have spent almost three times as much as the Labor Department's Bureau of Apprenticeship and Training on apprenticeship. During the Reagan-Bush era, BAT's staffing was cut by nearly 50%, dramatically reducing the Federal Government's ability to regulate apprenticeship programs.

Our BAT-approved programs have proven for more than a half century their worth in providing the very type of training and skill development that is being called for by the Nation's political and business leaders. According to the GAO's report, joint labor-management apprenticeship programs have the largest number of enrolled apprentices. And, our programs have a much better record for graduating apprentices to journeyman status than other programs. Apprentices enrolled in labor-management programs are encouraged by the sponsoring unions to remain in the program and have a better sense that the apprenticeship process will result in a long-term career in the industry. The union's sponsorship of a joint labor-management program ensures that the apprentices' interests will be protected.

And yet, these very programs will become a direct casualty if Hydrostorage and similar decisions are allowed to stand. That effect is not desirable from the standpoint of the unions I represent or the workers they represent. Moreover, it is not good for the construction industry as a whole, or for the national need for a highly trained work force. That is one of the compelling reasons for enactment of H.R. 1036.

State Prevailing Wage Laws

As serious as the situation is with respect to State apprenticeship laws, that is only one part of the problem. The other is the invalidation of State public prevailing wage laws, also under a misguided interpretation of the preemption provisions of ERISA. A case in point is General Electric Co. v. New York State Department of Labor, et. al., 891 F.2d 25 (2d Cir. 1989), cert. denied, 496 U.S. 912 (1990). In that case, the Second

Circuit Court of Appeals held that a provision in the New York State prevailing wage law, which requires employers to provide the prevailing level of employee benefits or their cash equivalent to employees working on public construction projects, is preempted by ERISA.

Thirty-one States[5/] have enacted prevailing wage laws which require contractors who successfully bid for public works projects to pay their workers on these projects not less than the dollar value of the wages and employee benefits prevailing in the community. The purposes of these State prevailing wage laws include: (1) to protect local wage standards by preventing contractors from basing their bids for public works on wages and benefits lower than those prevailing in the area; (2) to equalize competition among all contractors bidding on public works projects by standardizing labor costs; and (3) to maintain quality work standards. Originally, only cash wages were covered by these State laws. But, as employee benefits like health and life insurance, disability benefits, training, and the like have become an important aspect of employee compensation, these laws, like the Federal Government's Davis-Bacon Act, have been expanded by the States to include the cost or value of prevailing employee benefits in the calculation of the prevailing wage and to provide a credit towards the prevailing wage requirement for contributions by contractors to employee pension, health and welfare plans.

These State laws do not require employers to establish or maintain any employee benefit plan. Nor do they mandate the content of plans or regulate the operations of plans. Yet, New York State, as well as the States of Pennsylvania, California, Illinois, Oklahoma, Montana, Washington, and Nevada, among others, have seen their prevailing wage laws invalidated in some key respects by judicial misreadings of ERISA's preemptive reach, and public authorities in other States have been chilled in the enforcement of their laws as a consequence. The longstanding prevailing wage law of Michigan is under challenge in the courts even as we speak.

In negating these worker protections, the General Electric decision, and similar rulings, also eviscerate State and local public policy and police powers traditionally reserved to these governments. The Court effectively nullified New York State's century-old policy of preventing unfair bidding practices on public works projects and assuring a minimum level of compensation for those employed on such projects.

New York's prevailing wage law dates back to 1894, when the State legislature passed its first prevailing wage statute. The importance of this legislation to the public policy of the State is evident from the fact that when the 1894 statute was held to violate the State constitution, New York amended its constitution and then re-enacted the statute.[6/] New York's policy was explained succinctly by Chief Judge Cardozo in 1927:

> The public policy of the State declared by successive Legislatures during a period of 30 years exacts the payment of the rate of wages prevailing in the vicinage to laborers and mechanics employed upon the public works.[7/]

In General Electric, the employer challenged the district court's enforcement of a penalty imposed by the Commissioner of Labor for failure to pay prevailing supplements as required by the statute, arguing that the supplements provision was preempted by ERISA §514. The Second Circuit, ignoring its own earlier warning that "an exercise of a State's police powers...should not be superseded by federal regulations unless that was the clear intent of Congress,"[9] sided with the company, holding that the requirement that contractors on public works projects provide the prevailing rate of supplements or the cash equivalent thereof was preempted by ERISA. The result of this decision is not merely the preemption of the supplements provision, but also the effective nullification of New York's entire prevailing wage law.

Supplements, or employee benefits, are an increasingly important form of compensation for New York's work force, as well as for the Nation's work force. Employee benefits contributions constitute a large percentage of the total compensation package offered to employees. In the Rochester, New York area, for example, employee benefits or supplements have constituted 15 to 30 percent of the total package for employees in the construction trades.

If contractors from outside a particular locality or non-union contractors are not required to pay the prevailing rate of supplements, the overall labor costs for those contractors will be significantly lower than the labor cost of local contractors. As a result, those local contractors who are contractually required to provide employee benefits to their workers will be placed at a competitive disadvantage in bidding on public works projects. This is exactly what the legislature sought to prevent when it amended the New York prevailing wage statute to include supplements.

The effect of General Electric is thus to allow non-local and non-union contractors to pay their employees a total compensation package of up to 30 percent below the prevailing rate. This completely contravenes the State's long-standing policy, as expressed in Campbell, requiring "the payment of the rate of wages prevailing in the vicinage to laborers and mechanics employed upon the public works."[9]

Due to the detrimental effect that General Electric will have on prevailing wage laws throughout the Nation, and because there is no evidence that Congress ever intended to preempt the long-standing policies of New York and of the 30 other States to provide for fair bidding and a minimum level of total compensation on public works projects, it is necessary to amend ERISA to prevent this unintended outcome from becoming the law of the land.

A less apparent adverse result of the General Electric decision is its effect on pension, health and welfare, and other employee benefit funds. I cannot better describe the problem than the House Committee did in its September 1993 Report when it stated:

> In addition to undercutting local labor conditions and placing fair contractors at a competitive disadvantage, General Electric and its progeny cases have had another effect which

> runs counter to the purposes and policies of ERISA. By removing the employee benefits component from the prevailing wage calculation, these court decisions create a disincentive for contributions to collectively-bargained, multiemployer pension, health and welfare plans. This disincentive, together with the competitive advantage given to employers without collective bargaining obligations, causes a decline in the contribution income of these plans. The committee heard testimony that ERISA preemption of California's prevailing wage laws will cause workers benefit plans to lose at least 30% of their contribution income and diminish the ability of these plans to pay benefits; the opposite effect of that which the drafters of ERISA and the 1980 multiemployer plan amendments had in mind.[10/]

The General Electric decision is an affront to the long-standing New York State public policy of fairness; fairness in the bidding of public works projects and fairness in support of the rates of wages and benefits prevailing in the locality of those projects. Furthermore, as demonstrated in the next section of this statement, General Electric is not supported by the language, legislative history, or purposes of ERISA.

The Original Intent of ERISA Preemption

I, and the organizations I represent, were active advocates of broad Federal preemption of State laws during the legislative process that produced ERISA in 1974. We urged that if ERISA was to be enacted at all, then the employee benefits field should be regulated exclusively and uniformly by the Federal Government. ERISA, in the words of the Supreme Court, is a "comprehensive and reticulated statute."[11/] It is a complex law, as the pleas for pension simplification in this body attest. To have imposed this level of Federal regulation on top of regulation by the States would have severely discouraged the maintenance and growth of employee benefit plans, contrary to the fundamental purpose of ERISA. The adverse impact of multiple regulation would have fallen most harshly on multiemployer pension, health, and welfare plans covering workers in multiple States. Such plans would have faced duplicative and conflicting regulation by each of the covered States as well as by the Federal Government. Even if it were possible for the plans to comply with all the applicable Federal and State laws, the costs of plan administration would have been greatly increased. And, every dollar spent on administration by a multiemployer plan is a dollar no longer available to pay benefits to workers.

Congress recognized the validity of these concerns in adopting the broad preemption provisions of ERISA. Senator Harrison Williams, a chief architect of ERISA,

> ...stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.[12/]

On the House side, Representative John Dent echoed these views, stating:

> Finally, I wish to make note of the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.[13]

Reading these statements and other legislative history, the Supreme Court has recognized that the preemption provisions of ERISA --

> Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among states or between states and the federal government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.[14]

Deviation From Congressional Intent

Throughout the years since ERISA's enactment, we have remained staunch defenders of broad ERISA preemption. The concerns and policies that led to enactment of ERISA's preemption provisions remain as valid and important today as in 1974. On balance, employee benefit plans, plan participants, and plan sponsors have been well-served by the exclusive federal regulatory scheme for employee benefits.

However, in the instances addressed by H.R. 1036, the courts have applied ERISA preemption well-beyond its intended scope to invalidate State laws that do not regulate private benefit plan matters, but rather set terms and conditions for the performance of public building and construction work for the State itself. I am referring, of course, to the Second Circuit Court of Appeals' decision in General Electric and the Ninth Circuit Court of Appeals' decision in Hydrostorage.

These court decisions are wrong. They misapply the Congressional intent of ERISA's preemption provisions. The ERISA legislative history demonstrates that Congress was concerned with multiple, conflicting government regulation of benefit plans. There is no indication that Congress intended to prevent a State from setting the terms and conditions under which it will procure goods, services or other work. There is no indication that Congress intended ERISA to restrict the States' freedom to contract on public works.

This distinction between a State as the regulator of private sector conduct and a State as a purchaser of goods and services for the public was sharply drawn by the Supreme Court in its March 8, 1993 decision in Building and Construction Trades Council v. Associated Builders & Contractors[15]. In that case, the Court rejected arguments by a non-union contractors association that the National Labor Relations Act preempts the Commonwealth of Massachusetts, through its water resources agency, from requiring all contractors bidding on the agency's Boston Harbor wastewater treatment facilities construction project to agree to a labor agreement negotiated in advance between the agency and the building trades unions. The Court reasoned that while the NLRA would constrain State regulatory activities, the Massachusetts agency was not

acting as a regulator but rather as a purchaser of construction services in setting the terms under which it would contract for these services. The following excerpt from the Court's opinion is instructive:

> A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation.
>
> Our decisions in this area support the distinction between government as regulator and government as proprietor....
>
> There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may chose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as a purchaser should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.

With regard to apprenticeship, ERISA contains no apprenticeship training or employment standards. It merely imposes additional reporting and disclosure requirements, fiduciary standards, and related enforcement provisions on employer and union-sponsored apprenticeship and training programs.

H.R. 1036, Mr. Chairman, would restore ERISA preemption to its original, intended boundaries by overturning the General Electric and Hydrostorage decisions, and their progeny.

State Mechanics' Lien Laws And Collection Remedies

H.R. 1036 would also expressly exempt from ERISA preemption State laws providing additional remedies or means for collection of contributions owed to a multiemployer pension, health or welfare plan. This amendment, too, is needed to protect the financial soundness of these benefit funds, as well as to restore the original intent of ERISA, confirmed by Congress in 1980, to leave undisturbed State contribution collection remedies. This need has been created by some Federal and State court rulings that ERISA's preemption provisions disable multiemployer plans from continuing to use mechanics' liens and other similar State law means for securing and collecting

contributions owed to them for work performed by worker-participants covered by the plans.[16/]

Multiemployer pension, health, and welfare plans are financed by collectively-bargained employer contributions generated by the work performed by workers covered by these plans. Typically, in the building and construction industry, these contributions are based on a dollars-and-cents per work hour contribution rate set forth in the collective bargaining agreement or in plan documents. Although labeled as employer contributions, the reality is that plan contributions are really substitute wages; they are a part of a worker's compensation for his or her labors.

The vital importance of effective contribution collection was a focus of Congress in enacting the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) amendments to ERISA, a fundamental purpose of which was to "enhance the financial stability" of multiemployer plans in recognition that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected" by such plans.[17/]

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans.
>
> While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contributions rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.[18/]

A product of these Congressional concerns was MPPAA's addition to ERISA of Section 515;[19/] a specific statutory requirement that employers satisfy their contribution obligations to multiemployer plans. MPPAA also added ERISA Section 502(g)(2)[20/] mandating certain federal remedies in multiemployer plan lawsuits to collect delinquent employer contributions.

In enacting these MPPAA amendments to ERISA, the 1980 Congress confirmed that State, as well as other Federal, remedies and means for contribution collection would remain available to plans. So, for example, Congress noted that the MPPAA amendments "do[] not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions."[21/]

This preservation and expansion of collection remedies was consistent with the fundamental MPPAA purpose of enhancing the ability of plans to recover due contributions and maintain their financial stability. It was also consistent with the original intent of ERISA as enacted in 1974. As the U.S. Supreme Court ruled in Mackey v. Lanier Collection Agency & Service Inc.,[22] "state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA...." Indeed, as the Mackey Court recognized, the Federal Rules of Civil Procedure, and particularly Rule 69,[23] have long-provided for the federal courts to "defer[] to state law to provide methods for enforcing [federal] judgments."[24]

Mechanics' liens are a fundamental, longstanding aspect of the law of all 50 States. They are a traditional means by which workers secure payment of their wages and benefits for the work they perform in erecting or repairing a building or other property. Having added value to the property through their labor, the workers are entitled to a lien on the property to ensure payment for their work, just as other providers of goods and services are able to secure payment through liens on the benefitted property.

State mechanics' liens are a particularly important means of collecting delinquent contributions for multiemployer plans in the building and construction industry. This industry is composed largely of hundreds of thousands of small contractors who are geographically mobile and who work primarily on short-term projects. According to Commerce Department figures, only about 100,000 of the 1.9 million construction firms have more than ten employees. It is common for these contractors to go bankrupt, to dissolve, or to simply disappear. Many contractors routinely change names and identities.[25] But for a lien on the property and the ability to foreclose, the workers and their pension, health, and welfare plans would often remain unpaid in the wake of unfaithful contractors; a fate long ago rejected by the public policies of the States. State "little Miller Acts" providing payment bonds on public works projects, stop-order notice procedures, contractor payment guarantee laws, and similar State law means for securing and collecting contributions are also essential tools for plans in the building and construction industry.

The devastating real world impact of these court rulings on workers and their pension and health plans was brought home to the House Committee by testimony at its March 24, 1993 hearing that the El Capitan court decision, preempting California's mechanics lien law, itself caused the workers to lose about $120,000 in benefit plan contributions. More than 150 other collection cases had to be compromised or dismissed outright by the plans involved.

In the case of one particular contractor owing about $84,000 in benefit plan contributions, the plans' inability to record mechanics' liens or assert bonding claims because of ERISA preemption has left them with no effective remedy. In 1982, 66 percent of the plans' contribution collections came through mechanics liens, surety bonds, and stop-notices. In contrast, by 1992, these collection procedures had been so

undermined by ERISA preemption rulings, that only 5 percent of the plans' collections could be made through these procedures.

Absurdly, the effect of the court decisions is to discriminate against workers covered by ERISA pension, health and welfare plans, as explained by dissenting Judge Pregerson in the Sturgis case:

> Employee benefits (which may include pension, health and welfare, and vacation benefits) are an important part of an employee's compensation. The result of the majority's opinion is that employees who are not members of ERISA plans may use mechanics' liens to ensure that employers fulfill their obligations to pay benefits – but members of ERISA plans may not.[26]

I should hasten to add that the workers and their benefit plans are not the only beneficiaries of the protection afforded by mechanics' lien laws and other State laws providing collection remedies. The faithful employers, who do live up to their plan contribution obligations, are prejudiced by the contribution defaults of their competitors. These good employers are placed at a competitive disadvantage relative to delinquent employers, and so share an interest in the effective collection of all due plan contributions from all employers.

H.R. 1036 Preserves Bipartisan Compromises

H.R. 1036 preserves bipartisan compromises that were first worked out on the House floor during debate and passage of the predecessor bill, H.R. 2782, in the 102d Congress. Specifically, the bill expressly provides that it shall not be construed to allow the States to mandate an employer to create or maintain an employee benefit plan or to provide particular employee benefits under prevailing wage laws. And, the scope of the bill's exemption for State prevailing wage laws is limited to public works projects. In further response to Republican concerns, the bill reaffirms that ERISA's reporting and disclosure requirements, fiduciary standards, and related enforcement provisions will continue to apply to apprenticeship and training programs.

Conclusion

In conclusion, Mr. Chairman, let me be clear about what H.R. 1036 does not do. It does not require any State to enact or maintain a prevailing wage law, an apprenticeship standards law, or a mechanics' lien law, or any other kind of law. Rather, the bill merely clarifies that ERISA is not an impediment to those State and local governments which choose to enact and maintain the kinds of laws covered by the bill. The bill preserves traditional States' rights and worker protections, and promotes apprenticeship and training, without offending any of ERISA's purposes or policies.

H.R. 1036 does not preclude Congress from later enacting legislation establishing a new, comprehensive apprenticeship training and employment system after due deliberation. H.R. 1036 does not make any changes to the Davis-Bacon Act.

I and the workers I represent thank you for prompt, favorable action on H.R. 1036. I would be pleased to answer any questions that you may have.

1/ *H. Rep. No. 103-253, 103d Cong., 1st Sess. (September 22, 1993).*

2/ *Codified at 29 U.S.C. §50, as follows:.*

> *"The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts by apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education in accordance with section 17 of Title 20. For the purposes of this chapter the term 'State' shall include the District of Columbia." (Emphasis added.)*

3/ *Any person or group that feels that a State Apprenticeship Council is acting unfairly has recourse under State law and the State's political processes (inasmuch as SAC members are typically political appointees). In addition, the Labor Department's regulations provide a formal complaint procedure which can result in the Department "derecognizing" a State Apprenticeship Council and thereby withdrawing the State's authority to register and regulate apprenticeship programs for Federal purposes. (29 C.F.R. §29.13).*

4/ *Letter dated June 15, 1993.*

5/ *Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Washington, West Virginia, Wisconsin, Wyoming.*

6/ *L. 1906, c.506.*

7/ *Campbell v. City of New York, 244 N.W. 317 (1927).*

8/ *Rebaldo v. Cuomo, 794 F.2d 133 (2d Cir. 1984), citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).*

9/ *Campbell, supra, 244 N.Y. 317 (1927).*

10/ *H. Rep. No. 103-253, 103d Cong., 1st Sess. at 8-9.*

11/ *Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980).*

12/ *120 Cong. Rec. 29933 (1974).*

13/ *120 Cong. Rec. 29197 (1974).*

14/ *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, (1990). See also, FMC Corp. v. Holliday, 498 U.S. 52 (1990).*

15/ *113 S.Ct. 1190 (1993).*

16/ *See, e.g., Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir. 1990), cert. denied, 110 S.Ct. 3272 (1990)(Louisiana mechanic's lien law); Carpenters So. California Admin. Corp. v. El Capitan Serv. Corp., 53 Cal. 3d 1041, 282 Cal. Rptr. 277, 811 P.2d 296 (Sup. Ct. 1991), cert. den., 112 S.Ct. 430 (1991)(California mechanic's lien law); Stuyvis v. Herman Miller, Inc., 943 F.2d 1127 (9th Cir. 1991)(California mechanic's lien law); McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991)(Massachusetts lien law); Bricklayers Local 33 Benefit Funds v. America's Marble Source, Inc., 950 F.2d 114 (3d Cir. 1991)(New Jersey employee benefit security law). But see, Plumbers Local 458 Holiday & Vacation Fund v. Howard Immel, Inc., 151 Wis.2d 233, 445 N.W.2d 43 (Wis. Ct. App. 1989)(upholding Wisconsin mechanic's lien law).*

17/ *See Pub. L. 96-364, §3; 29 U.S.C. §1001(a) (1980).*

18/ *Senate Labor and Human Resources Committee Summary and Analysis of Consideration of S.1076 (April 1980). See also 126 Cong. Rec. 23,039 (1980) (remarks of Rep. Thompson); Id. at 23,288 (remarks of Sen. Williams); Central States Pension Fund v. Alco Express Co., 522 F.Supp. 919 (E.D. Mich. 1981)(collecting the history of MPPAA's contribution provisions).*

19/ *29 U.S.C. §1145 (1980).*

20/ *29 U.S.C. §1132(g)(2) (1980).*

21/ *H. Rep. No. 96-869 (Part II), 96th Cong., 2d Sess. 48-49 (1980).*

22/ *486 U.S. 825, 834 (1988).*

23/ *28 U.S.C., Civil Procedure Rule 69.*

24/ *486 U.S. at 833-34. See also Id. at 836 ("Where Congress intended ERISA to preclude a particular method of state-law enforcement of judgments...it did so expressly in the statute").*

25/ *See, e.g., NLRB v. Associated General Contractors of Calif., Inc., 633 F.2d 766, 769 (9th Cir. 1980) cert. denied, 452 U.S. 915 (1981)(contractor changed its business name 18 times within a 9-month period).*

26/ *943 F.2d at 1131.*

RESPONSE OF ROBERT A. GEORGINE
AND JOE DART TO
SENATOR THURMOND'S QUESTION
CONCERNING S. 1580

QUESTION

The cases in Pennsylvania point to a rather absurd result. This is, the telephone company cannot be competitive in installing telephones in State buildings because of a law designed to protect construction unions. Does this result truly serve a unique state interest, given the fact that one of the victims here, the telephone company, actually provides better benefits than your unions?

RESPONSE

Pennsylvania's prevailing wage law does not make any telephone company non-competitive, and is not responsible for any company's inability to compete. This law, like all State prevailing wage laws, assures a level playing field of competition for responsible employers wishing to bid on public works contracts. Any employer wishing to bid on such work can accommodate itself to the labor standards uniformly required of all bidders. Any employee group that wishes to have its employer bid on such work can fashion its agreements with the employer to accommodate these uniform labor standards.

Pennsylvania's prevailing wage law does require every public works contractor to pay no less in cash wages than the cash wage rate determined by the State to be prevailing in the community, and does not permit this cash wage to be offset by benefit plan contributions. This is, in effect, a minimum wage law. And, it reflects the public policy judgment of Pennsylvania that the workers' standard of living and the community's economy would be best protected by requiring that the worker be paid a certain portion of his/her compensation in cash. Only cash -- not benefit plan contributions -- can be used by a worker to buy groceries, pay the rent or mortgage, and obtain other necessities, goods and services that drive the community's economy. This law is not unlike the Fair Labor Standards Act in setting a minimum cash wage that cannot be reduced by substituting benefit plan contributions for cash wages.

As to the prevailing benefit plan contribution rate, Pennsylvania allows an employer to either make the prevailing contributions or to substitute cash wages for such contributions. An employer is not required by the law to establish or maintain any benefit plan, or to provide pension, health or any other benefit plan coverage; the employer can simply pay all of the prevailing benefit contribution as additional cash wages. No employer is prohibited from providing higher benefit contributions than are prevailing; it simply cannot use these higher benefit plan contributions to reduce the minimum cash wage rate.

Preserving State laws like Pennsylvania's from unintended Federal preemption is consistent with the Senator's longstanding interest in protecting States' rights.

QUESTION from Senator Thurmond:

"I notice that a witness scheduled to testify against this legislation is a representative from your rival business association, the Independent Electrical Contractors, Inc. We could take the split as an indication that NECA is more enlightened than the other group. Or we could interpret this as a split over those who are benefitted by the legislation versus those at whose expense that benefit is taken. Can you demonstrate which one of these possibilities is correct?"

RESPONSE from Larry Bradley:

Before responding to the specifics of the questions, I believe I should point out the following:

The IEC is not a "rival" organization, but a national group with a much smaller membership than NECA. NECA is a broadly-based, full-service association which has been representing the interests of the entire electrical industry since 1901.

NECA provides the industry with a complete range of services, including marketing services, management services and consulting, codes and standards development and liaison, labor relations services, government affairs and insurance programs. The association lists nearly 1,000 separate publications and programs available to member firms and the industry.

NECA also publishes an award winning monthly magazine, *Electrical Contractor*, with a circulation of over 80,000 as well as a weekly newsletter for its membership. In addition it sponsors the nation's premier electrical exposition in conjunction with its annual convention. NECA's maintains 122 autonomous local chapters in 47 of the 50 states, of which my own - the Penn-Del-Jersey Chapter - is one. Each Chapter maintains its own staff to further enhance delivery of NECA programs. In addition, NECA provides services to several affiliated international chapters and individual members throughout the entire world. Individuals whose contributions to the electrical construction industry are worthy of broad recognition are honored by membership in the Academy of Electrical Contracting.

The IEC, on the other hand, has more limited capabilities. In areas of mutual concern we have and are currently - working together. It is not a rivalry, but our breadth of viewpoint which sets us at odds on this issue.

The witness representing the IEC was neither a contractor nor a staff member of that organization, but an employee of one of its member firms who was relating a single case concerned only with his own experience. This is significant. It is why I feel that, though "enlightenment" is not exactly the word I would have chosen, NECA's viewpoint is certainly more national in scope and represents the essence of a broad cross section of the industry.

The IEC witness at the hearings was speaking of a first person experience in Washington state, where the state had disallowed his application for registration of an apprenticeship program. This, in itself, was an anecdotal approach to a problem that is of nationwide proportions. We did not hear the reason his program was not accepted. We did not have an opportunity to compare the details of his proposed program with those of the existing state-approved program for training electrical workers. Without that comparison, we cannot adequately judge whether or not his proposed program was at all comparable in its capability for graduating qualified, fully-trained electrical workers.

Many programs which we have seen attempted to be approved at a state level, though not necessarily this particular instance, have been woefully inadequate. "Graduates" of such programs would be electrical workers in name only, and would be a potential danger to themselves, their employers and the eventual owners of buildings on which they had worked.

We also noted that the IEC's witness was testifying before this Committee without having fully utilized, much less exhausted, the state appeals process available to him. Instead, the courts were his next step of choice. This is too important an issue to rely on a single anecdote, where the party had not even exhausted his administrative remedies before filing suit, as a basis for retaining an wrenching misinterpretation of ERISA which is wreaking havoc in the states.

Court cases using this gross misinterpretation of the ERISA preemption language are having an impact all across the nation. They are destroying state apprenticeship programs at the expense of adequate training standards. They are leaving the worker, his employer and the consuming public at great risk from such inadequate training in a trade which requires substantial knowledge and technique to produce safe and high quality installations.

Quite simply, inadequate training can lead to electrical hazards and fires. That is why states regulate and oversee apprenticeship programs and set standards for them.

Furthermore, the improper and unforseen application of the ERISA preemption to invalidate state prevailing wage laws and the use of state lien laws for collecting owed but unpaid contributions to employee benefit trusts turn the entire concept of ERISA on its ear.

The preemption was included to prevent local laws from undercutting the end result intended by the law - protection of employee benefits. Using this preemption to invalidate a state-set level of fair wages or to prevent employees from obtaining for contributions legally owed to their benefit trusts quite simply turns the ERISA law on its ear. Moreover it is a violent disservice to the exercise of states' rights.

These are, quite obviously, consequences wholly unforseen and unintended by those who wrote and passed ERISA. Nowhere in the legislative history of that legislation is there any mention of this sort of intent. Indeed, the intent is consistently shown to be quite the opposite.

Therefore, yes, we believe that our position is, indeed, the broader perspective and could be interpreted as being the "more enlightened" of the two positions. Thank you for allowing us this opportunity to respond.

To John Hudacs, New York Labor Commissioner:

In the General Electric case, the court rejected the New York policy of mandating specific benefits obligations through the mechanisms of the prevailing wage law. Open shop contractors, companies with Teamsters contracts rather than with the local building trades, and out of state companies all were put at a disadvantage. Is it your desire, or the policy of the state of New York, to return to that policy of mandating specific benefits?

STATE OF NEW YORK
DEPARTMENT OF LABOR
Governor W Averell Harriman
State Office Building Campus
Albany, New York 12240

JOHN F. HUDACS
Commissioner of Labor

April 11, 1994

The Honorable Edward M. Kennedy
Chair, Committee on Labor & Human Resources
United States Senate
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

I appreciate the opportunity to provide additional comments to clarify New York State's position regarding the pending ERISA legislation.

Senator Strom Thurmond has inquired whether New York State intends to return to a policy of mandating specific benefits in its enforcement of the prevailing wage law. New York will not be returning to a system of mandating specific benefits but will continue its current policy of requiring a specific dollar amount of supplemental benefits which a contractor will be able to satisfy by any combination of payment methods.

Sincerely,

John F. Hudacs

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

March 9, 1994

The Honorable Edward M. Kennedy
Chairman, Labor and Human Resource Committee
U. S. Senate
Dirksen Building 428
Washington, D. C. 20510

Dear Senator Kennedy:

We understand that the testimony being submitted before your Committee may not correctly characterize apprenticeship in the state of Washington.

Attached please find a position paper that clearly sets forth the position of the Washington State Apprenticeship and Training Council and its administrative arm, the Department of Labor and Industries' Apprenticeship Section.

Please accept the attached position paper and incorporate it into the testimony for your committee.

Sincerely,

Ernest L. Huntley
Acting Secretary
Washington State Apprenticeship
and Training Council

February 16, 1994

Position Paper

The Independent Electrical Contractors' apprenticeship program was developed by a group of employer and employee representatives which was submitted in October of 1992 to the Washington State Apprenticeship and Training Council for approval. Prior to the October Meeting of the Council, the sponsor was notified of the areas of discrepancies in violation of apprenticeship laws and regulations to include the department's recommendation to the Council to approve or disapprove the program. (See Attachment #1 which includes Assistant Director's recommendation, Council's recommendation, and apprenticeship standards.)

At the October meeting, the sponsors were informed of the violations and were unable to substantiate the employee representatives as being from a bona fide collective bargaining agent that has the authority to represent the

employees. The state law as well as the federal law specifically states the employee representatives must be from a bona fide collective bargaining agent in order for a sponsor to have a joint committee consisting of employers and employees. (See Attachment #2, RCW 49.04.040 and 29 CFR Part 29 Definitions and WAC 296-04-001.)

The program was resubmitted in January of 1993 and was not heard before the Council as the meeting was canceled due to a power outage occurring in the state. However, the discrepancies and areas of noncompliance that were identified at the October 1992 meeting were not corrected. There were some corrections to the minor discrepancies that the department had identified. As a result, the department notified the sponsors of the discrepancies as well as the Secretary's recommendation to the Council to disapprove the program. (See Attachment #3, Secretary's letter to the Council dated January 4, 1993, and apprenticeship standards.)

The program sponsor met with the existing committed and requested representation on the existing committee's board which was accepted but the IEC representative did not participate even at the invitation to accommodate their training needs by the existing program. (See Attachment #4, Letter from Karen Carter.)

The program was resubmitted for Council approval at the April 1993 meeting and the Department of Labor and Industries recommended disapproval because of RCW 49.04.040, WAC 296-04-001, and minor discrepancies that existed with the program. (See Attachment #5, Recommendation from Secretary of Council and apprenticeship standards.)

The program was approved on July 21, 1993, as an employer program because the sponsors could not substantiate the employee representatives were from a bona fide collective bargaining agent that had the authority to represent the employees of the industry. The IEC program has been in place since July 1993 and the Washington State Apprenticeship and Training Council has not encountered thus far any problems with the operation of the program in training apprentices in the electrical industry. (See Attachment #6, Secretary's and Council's recommendations.)

As of June 1992 Riteway Electric was not registered or participating in a state or federal approved program. See attached letter from Rebound dated June 11, 1992. The Washington State Apprenticeship and Training Council did not direct the apprenticeship staff to assist the program in the development phase. The staff of the Apprenticeship Section act as consultants to proposed new employer apprenticeship programs and subsequent to IEC's initial approval, the staff was assigned to work directly with IEC to address the discrepancies and to assist them in resolving any barriers that would restrict their participation in the existing program. In light of the assistance provided by the department and the existing program, IEC sponsors were involved in a series of meetings to resolve their problems; however, they continued to seek the approval of a joint program which did not meet the criteria for approval under both state or federal apprenticeship laws.

Questions to the Sponsor

1. Washington state law provides employers with equal access to apprenticeship programs to participate in existing programs without being party to a collective bargaining agreement. What were some of the barriers that prevented the IEC employers from participating in the existing program and what attempts were made to resolve them?

2. In the opening statement of your testimony, you stated that you were an electrician working for an electrical company. If the federal and state laws require the employee representatives to be from a bona fide collective bargaining agent, and you have stated that you are not a member of a collective bargaining agent, how can you in all honesty represent the employees of the electrical industry and be free from coercion from management?

3. In regard to ERISA and the Independent Electrical Contractors, what percentage of your contractors currently participate in an ERISA approved plan?

The ERISA preemption is currently undermining employees' pensions because formerly, Taft-Hartley trustees could sue the state to recover unpaid pensions, welfare, and withholding contributions. The trust could also recover attorney fees. Under ERISA, state law is preempted. Hence, the trustees must sue in federal court. These court costs cannot be recovered and the pension trusts must bear the cost. ERISA as written is preempting state law that provides protection of employees' pensions.

March 16, 1994

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. 1580

Dear Mr. Chairman:

We are pleased to support the passage of S. 1580. Congress needs to clarify ERISA's preemptive powers to insure that state and local governments can manage the delivery of public services fairly and efficiently. This problem can be present whether the public project entails construction or the delivery of services. We are asking that you assure the committee report reflects that the scope of this reform resolves ERISA's constraint on public projects, whether the work is on a construction or a service project.

The past decade has seen a dramatic increase in the number of private sector contractors who perform public services. These public projects include a broad range of activities, including home health care workers, data processors, food service workers and sanitation workers. As state and local governments have experimented with privatizing public services, many have found that irresponsible contractors are no more efficient than public servants. They often produce "cost savings" by eliminating the health insurance and retirement benefits of the employees who provide these government services.

To prevent this abuse, a growing number of jurisdictions require vendors who wish to bid for a public service contract to agree to pay prevailing wages and benefits when working on that public project. Procurement standards that require a minimum level of health insurance or retirement benefits exist at either the state or local level in jurisdictions as varied and diverse as Massachusetts, Rhode Island, Florida and Arizona. These rational policies are now threatened by decisions like the

ruling of the Second Circuit Court of Appeals in General Electric v. New York Department of Labor, 891 F.2d 25 (2d Cir. 1989).

State and local governments have a vital interest in making sure that those citizens who provide public services have wages and benefits that allow them a reasonable standard of living. Congress can help achieve this goal by limiting ERISA's preemption provision when state and local governments contract with private service contractors on public projects. This reform will also allow state and local governments to develop an economically rational system of measuring the cost of services. State and local governments frequently bear the cost of medical care for the sick and financial assistance for the elderly when their citizens do not have health insurance or a retirement plan to protect them. This reform will give state and local government the flexibility to prevent this cost shifting when contracting for public services.

The passage of S. 1580 will insure that ERISA does not prevent state and local governments from adopting a sound procurement system for public projects. This will improve the living conditions of many working Americans, will permit state and local government to operate a rational contracting system and will prevent unfair cost shifting. We strongly support its passage.

Respectfully,

John J. Sweeney
President
Service Employees' International Union, AFL-CIO

Gerald W. McEntee
President
American Federation of State, County and Municipal Employees, AFL-CIO

Ronald Carey
President
International Brotherhood of Teamsters, AFL-CIO

Albert Shanker
President
American Federation of Teachers, AFL-CIO

EQUAL RIGHTS ADVOCATES

1663 MISSION ST., STE.550 SAN FRANCISCO CA 94103 415/621-0672 FAX: 415/621-6744

March 9, 1994

Senator Edward M. Kennedy
Chairman, Senate Labor & Human
Resources Committee
United States Senate

By Facsimile: 202-224-5128

Re: HR 1036

Dear Senator Kennedy:

I write in support of HR 1036 because it will allow states to create laws and regulations which will improve the position of women in nontraditional jobs.

Equal Rights Advocates, Inc. is a public interest legal and educational corporation specializing in the area of sex discrimination. Since its inception 20 years ago, ERA has specialized in litigation and advocacy aimed at the promotion of equality of the sexes under the law, including access of women to blue collar trades.

California has an apprenticeship program intended to promote women and minorities (the California Plan for Equal Opportunity in Apprenticeship - the "Cal Plan.") While ERA frequently criticizes the implementation of this program, it is the primary vehicle which will allow for integration of women into construction jobs. ERA supports HR 1036 because subsection (B) will permit state programs like California's to promote women's access to construction jobs through creative legislation and regulation.

One such piece of legislation, former California Labor Code section 1777.5, did just that by providing for a ratio of one apprentice for every five journey level workers on state public works contracts. Because very few women are journey level workers as compared to apprentices, increasing the number of apprentices working on any contract directly affects the sexual makeup of the work force. This legislation was the subject of an ERISA preemption challenge in Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. denied, 112 L.Ed.2d 46 (1990). ERA participated as amicus curiae in this case because of our strong belief that the labor code section promoted an increase in the number of women in apprenticeship programs. As you are probably aware, the Ninth Circuit found that ERISA did preempt the state statute. HR 1036 would reverse this holding and allow states to legislate in this area.

I would also like to comment on Mark R. Thierman's letter to the Chairman and members of the United States House of Representatives, Committee on Labor-Management Relations, dated April 7, 1993, wherein he referred to a hearing held before California's Little Hoover Commission and a letter issued as a result of that hearing from the Little Hoover Commission Chairman Nathan Shappel to California's Director of the Department of Industrial Relations. I am familiar with those proceedings not only because I was a witness at the Commission hearing, but because the hearings were held at my request to examine the failure of the Department of Industrial Relations to enforce the Cal Plan. First, the hearings addressed the issue of women in apprenticeship programs and not just minorities. (While this is not particularly relevant to Mr. Thierman's position, it does indicate his lack of information regarding this hearing.) But more important, nothing in the hearing or the letter suggests that limiting the state's authority to regulate apprenticeship programs as opposed to allowing the state to improve the way it implements its regulatory power will improve the position of women in apprenticeship. As pointed out above, the state's power in this arena can be extremely effective in increasing opportunities for women if implemented correctly.

For the foregoing reasons, ERA believes HR 1036 will assist women in gaining well-paying jobs in the construction industry. Thank you for providing us the opportunity to comment on this important piece of legislation.

Sincerely,

Judith E. Kurtz
Managing Attorney

JEK/dt

NAGLO **National Association of Governmental Labor Officials**

4001 N Lincoln Blvd, Oklahoma City, Oklahoma 73105
405-528-1500 528-5751 (Fax)

February 8, 1994

The Honorable Harris Wofford
Senate Labor and
Human Resources Committee
United States Senate
Washington, D.C. 20510

Dear Senator Wofford:

I am writing to you on behalf of the National Association of Governmental Labor Officials (NAGLO) to urge support from the Committee for H.R.1036, as passed by the House. NAGLO is comprised of the commissioners, directors and secretaries of the state and territorial Departments of Labor and Industrial Relations, many of whom have written to their respective delegations over several years asking for relief from federal ERISA preemption state labor laws in the area of prevailing wage rates and apprenticeship. NAGLO previously passed a resolution praising a similar bill, H.R.2782, from the last Congress, and is in support of the new version.

Federal court decisions such as in GE v. New York Department of Labor, and Hydrostorage v. Northern California Boilermakers Local Joint Apprenticeship Committee, have done tremendous harm to states' abilities to decide the ways to spend its own monies on public works projects, and to worker protection policy. Presently, 33 states have prevailing wage rate laws, while 27 states, the District of Columbia and Puerto Rico administer apprenticeship programs under the scheme of the Fitzgerald Act. You can see that enactment of H.R.1036 would have very significant and beneficial effects for these states.

NAGLO is extremely pleased that the Senate Labor and Human Resources Committee has invited New York Commissioner of Labor John Hudacs to testify on behalf of his state and this Association.

If you have any questions, please feel free to call me at (405) 528-1500, or our secretariat office at (202) 624-5460.

Sincerely,

Dave Renfro

Dave Renfro
NAGLO President, and
Commissioner, Oklahoma Department of Labor

Little Hoover Commission

1303 J Street, Suite 270 • Sacramento, CA 95814 • (916) 445-2125
FAX • (916) 322-7709

January 22, 1992

Lloyd W. Aubry, Jr., Director
Department of Industrial Relations
455 Golden Gate Avenue, Room 4181
San Francisco, CA 94102

Dear Mr. Aubry:

As you may be aware, the Little Hoover Commission conducted a public hearing last year regarding the Division of Apprenticeship Standards (DAS), the California Apprenticeship Council and the enforcement of the statutes and regulations embodied in the State of California Plan for Equal Opportunity in Apprenticeship, also known as the Cal Plan. The specific focus of the Commission's probe was to determine whether the above-referenced agencies were adequately enforcing the law to ensure that equal employment goals are reached in the apprenticeship programs.

The Commission has concluded that the depth of the problems in this troubled program would require an intensive study that is beyond the capability of the Commission at this time because of budgetary and staff constraints. The Commission has, however, identified specific concerns about which we feel it is imperative to alert you, as the new Director of the Department of Industrial Relations, so that you may take appropriate action.

The factual background is straightforward. In 1981, Tradeswomen, Inc., a national organization composed mostly of women in blue collar jobs, and several individuals represented by Equal Rights Advocates and the Employment Law Center, filed a lawsuit claiming that the Division of Apprenticeship Standards (DAS) was violating its statutory duties by not enforcing the Cal Plan. Following the filing of the lawsuit, extensive negotiations were undertaken, whereby DAS agreed to monitor construction apprenticeship programs to ensure that women were not being discriminated against, that stipulated goals were being met, and that programs were making an active effort to enroll women. Programs that did not meet affirmative action goals and timetables were to be sanctioned by the State and decertified,

if necessary. Despite this agreement, which took the form of a stipulated court order, the number of women apprentices in the constructions trades have rarely topped five percent (5%) and have never approached the twenty percent (20%) level required by the order. Nor has the State decertified apprenticeship programs or levied any meaningful sanctions.

The situation, however, is much more complex than the foregoing recitation of facts would indicate. Several reasons have made it very difficult for the State to meet its commitment:

- Significant changes in the budgeting for DAS -- the elimination of General Fund monies and a switch to reliance on fees -- have undercut the State's ability to adequately monitor apprenticeship programs.

- The voluntary nature of the apprenticeship programs, most of which are sponsored by unions, makes it difficult to pressure the program sponsors into meeting program requirements.

- Decertifying programs that have failed to meet quotas for employing women would, in some cases, do away with programs that are providing a tangible benefit to minorities.

Despite these mitigating factors, the State has an obligation to ensure that discrimination does not occur and that programs make a serious "good faith effort" to achieve parity in the apprenticeship programs. There are several areas you may wish to consider for reform, increased efforts or improved techniques:

- The Commission's hearing established that recruitment of women apprentices has not been effective, but that when good-faith and thorough recruitment efforts are made, many women do express interest in becoming apprentices. For instance, when the Oakland Private Industry Council circulated an announcement that there would be 24 openings in a skilled trades pre-apprenticeship course, nearly 500 women responded. Spreading the word effectively and appropriately would make a difference in the rate of female recruitment.

- There is an underlying conflict in the dual roles of DAS. On the one hand, this division is supposed to promote participation by unions and segments of industry in establishing apprenticeship programs. On the other hand, it has a regulatory role that casts it as the enforcer of standards and actions. With respect to anti-discrimination enforcement, at least, the federal Equal Opportunity Commission and the State's Department of Fair Employment and Housing are better suited to handle such complaints. The Commission received indications that these other avenues are rarely pursued by women, perhaps from lack of knowledge or fear of retaliation.

- The California Apprenticeship Council, which is responsible for hearing appeals, promulgating regulations and acting in an advisory capacity to the Department, has shown great reluctantance in certifying more than one program in a given area. In large part because second or parallel programs are usually not union-sponsored, and the California Apprenticeship Council is composed in large part of union representatives. Without certification these programs are prohibited from utilizing the State-funded community college apprentice training classes, without which the programs are not viable. Yet, when the Division of Apprenticeship Standards determines that a program is not recruiting women and minorities into the construction trades, as required by law, the argument for not decertifying the program has been that there would be no opportunity for current apprentices to complete their training. This may result in a state subsidy for the 'union only' segment of the industry, even when that segment continues to violate the law by not meeting affirmative action goals for women.

The Commission is reluctant to make recommendations based on its preliminary investigation of DAS and the apprenticeship programs. But the Commission believes the Department of Industrial Relations should address the above concerns and evaluate ways to increase successful efforts by apprenticeship programs to attract and train women.

Attached is a transcript of the Commission's public hearing. If the Commission can be of assistance in helping you address these problems, please alert our Executive Director, Jeannine English, at (916) 445-2125.

Sincerely,

Nathan Shapell, Chairman

The Clogged Pipeline of Craft Training

Business World

By Tim W. Ferguson

If the White House wants to emphasize worker training as part of its new "investment" budget, it ought to grapple with a political problem that has nothing to do with revenue: trade-union opposition. But this it apparently will not do.

In several states, jobs await those lucky enough to be electricians, heating and air-conditioning installers, welders and plumbers. That's the early evidence from "parallel" apprenticeship programs offered outside the unions—and over their objections—in places where organized labor previously controlled entry to formal construction training. These locations include California and Washington as well as major Midwestern and Eastern states.

How much of a difference would expansion of these efforts make? A big one, says Herbert Northrup, an emeritus professor at the Wharton School. He estimates that if these trades could truly be opened up, not just to full apprentices but to "helpers" currently stymied by union rules, 500,000 to 750,000 people—many of them currently unemployable above the minimum wage—could be added to the U.S. rolling now in construction crafts.

David Turner, a federal training official in San Francisco, is more cautious but says nonunion contractors could be able to double the approximately 100,000 apprentices in the industry now.

The issue is hot in some of the 27 states that regulate apprentices. There, the unionized sector—even though its construction-market share has dwindled to perhaps 25%—has dominated the licensing process. However, a series of court interpretations of the federal law known as Erisa (primarily concerned with pensions) are forcing those states to open up.

But just as results from the new programs seem to show, with perhaps 1,000 already taking part in California, a political reaction has set in. Rep. Howard Berman, a Los Angeles Democrat and one-time labor lawyer, has guided a measure through the House to return restrictive powers to the states. Sen. Arlen Specter (R., Pa.), whose the AFL-CIO granted a third term, has backed up the legislation in that chamber.

Even without the Berman bill, it isn't easy to get a viable "open-shop" apprenticeship program. Take the case of Leonard Edh, owner of Walther Electric in Ceres, Calif., near Modesto. A Swedish immigrant raised in a world of widespread craft training, he's created a modern teaching facility at his company offices. More than 25 high-school graduate hires are learning the trade there. But Mr. Edh cannot be sure, a decade into the most, whether his program will be allowed to yield more journeymen electricians. He's been thrown years of union resistance in the bureaucracy and the courts, and his foes are still trying to catch him in some technical violation of payroll procedures that could void his efforts.

Unions surrend access to their own apprenticeships, Mr. Edh contends. At one time, racial discrimination motivated their actions, but increasingly they are driven by the desire to protect the artificially high wages of existing members.

Because the burden of setting up apprentice training is so great, other nonunion firms are relying on programs run by the Associated Builders and Contractors (ABC), their trade group. But in the Los Angeles metropolitan area, these efforts, too, have taken years to gain approval and many still are being stalled.

A nonunion roofing apprenticeship in Northern California got going in 1991 after a five-year delay, and has about 200 participants. In that case, as in carpentry, the core issue is not so much restricted entry to the field as simply an intense desire by union shops to defend their market share.

The backdrop of this whole fight is the dramatic decline of the unionized construction industry. Although nonunion contractors can get idle hands in gear from the other side, or can rely on laborers to do some of the less-skilled craft work, they often hunger for sanctioned apprentices.

The reason is public works. In a slack construction period, projects involving the government may account for a third of all business. Under the federal Davis-Bacon Act and similar state statutes, a "prevailing" (union) wage must be paid on these jobs. But apprentices may be used for as little as half the journeyman pay. Because these apprentices must be officially sanctioned, nonunion contractors in some states can't compete for some public works because they lack a supply of this cut-rate personnel.

> Even without the Berman bill, it isn't easy to get a viable 'open-shop' apprenticeship program.

For electricians in California, the market rate for private jobs may be 10% below the approximately $25-an-hour journeyman scale. With helpers, who are able to do many of the menial and simple outlet tasks when allowed, savings may be even greater. The result is more workers on more jobs, but for less money.

The unions don't buy that tradeoff, so they try to protect their scale and, by limiting supply from nonunion training programs, maximize the "out of work" time for their members. The public-policy choice, then, might be reflected in this rough example: 100 craftsmen at $20 to $25 an hour vs. 250 at $10 to $25 an hour. If the skill levels are comparable in both cases, a state and nation with a blue-collar-employment problem should probably choose the latter. It would also enjoy lower construction and repair costs, and all the social benefits that follow.

Yet this has not been the thrust in regulated states, even ones such as California with a Republican governor heading most of the levers of power. The ABC trade group, despite its new overtures to cozy within the building industry, has been barely able to budge Sacramento. In some other major states, organized labor is even more entrenched. Its control in the New York metropolitan area is so tight that during the great 1980s high-rise boom, union work crews were brought from distant cities while locals wanted for jobs.

Unfortunately, because training, such as the Clinton administration's proposed "school to work" program entails major state participation, the political pressures exerted by the construction trade unions is likely to limit the ability to put dreams to work in several key vocations. Yet, the White House backs the Berman bill. Expanded job opportunities, it appears, aren't worth risking another tiff with the Big Labor base.

San Francisco attorney Mark Thierman, who has litigated on behalf of nonunion labor, says he believes that even if Berman passes, grounds can be found to secure the opening of new apprenticeship programs in the battleground states. But others disagree.

Technology should slowly diminish the importance of the construction trades, as more structures are composed of modular arrangements straight from the factory. But for some time to come, this line of work can be the ticket to a decent living for many more, if only all the states can be enjoined to make it possible.

STATE OF NEW YORK
DEPARTMENT OF LABOR
Governor W. Averell Harriman
State Office Building Campus
Albany, New York 12240

JOHN T. BUDACS
Commissioner of Labor

March 22, 1994

The Honorable Harris Wofford
United States Senate
521 Dirksen Building
1st and C Street, N.E.
Washington, D.C. 20510

Dear Senator Wofford:

Thank you for the opportunity to represent the National Association of Governmental Labor Officials (NAGLO) before the Senate Labor and Human Resources Committee on March 10, 1994. As a follow up to my testimony, I would like to remphasize three key points.

First, congressional action is necessary to stop the endless legal debate on the Employee Retirement Income Security Act (ERISA) pre-emption issues in the apprenticeship arena. Congress must act to protect the states' traditional enforcement powers. Without the ability to continue our presence in the prevailing wage and apprenticeship arenas, the states will become unwilling parties to the exploitation of workers. This will especially harm women and minorities as states often have requirements to assure fair treatment, which exceed the Fitzgerald Act requirements that would be precluded under ERISA.

Second, it is very important not to confuse the issue of ERISA pre-emption and the prevention of discrimination. ERISA pre-emption has nothing to do with minority and female participation in apprenticeship programs. The laws which ensure against discrimination in apprenticeship programs, the Fitzgerald Act and it's regulations, the Civil Rights Act of 1964 and 1991, the Rehabilition Act and Americans with Disabilities Act are Federal laws which are not affected by ERISA's broad pre-emption provision; the Hydrostorage case does not prevent the application of these laws in order to stop discrimination in apprenticeship programs.

The real issues are enforcement of existing laws designed to achieve equal opportunity and making sure people are held accountable for their actions. For example, in New York State we are strengthening our efforts in affirmative action by a) developing more stringent goals; b) providing better technical assistance; and c) increasing the use of sanctions. Currently 66% of our apprentices are in building trades programs. Our records show that 21% of apprentices in the trades are minorities and 5% are women. While I am not completely satisfied with these results, I am encouraged by the fact that minorities represented more than half (56%) of the new registrants in the building trades programs for 1993 and 7.6% were women. I am confident that our renewed efforts will produce even greater results for the future. Not only are women and minorities entering the building trades programs at record rates, we have seen completion rates of apprentices remain stable (68%) despite high unemployment.

Finally, I want to impress upon you that ERISA pre-emption will not increase the numbers of women and minorities in apprenticeship programs; in fact, it will do harm to the very people, to whom we are committed to ensuring a broader representation in apprenticeship. State laws, regulations and policies that strengthen Federal apprenticeship requirements will be struck down, thus weakening achievement in affirmative action. Many of the actions New York State is taking to improve opportunities for women and minorities, we are implementing based upon the broad authority granted to me under Article 23 of the Labor Law which governs the state operated apprenticeship program. ERISA pre-emption would prevent my being able to grant exemptions which allow sponsors to skip down a recruitment list and select a woman when there is underutilization of women in their program. It would also disallow a similar action under the authority of the State Human Rights Law, to select minority candidates.

Again, thank you for giving me the opportunity to share critical information on this subject which is of tremendous concern to myself and to NAGLO.

Sincerely,

John F. Hudacs

Carpenters / Contractors
Cooperation Committee, Inc.

520 South Virgil Avenue, Suite 201
Los Angeles, CA 90020
(213) 738 9071

May 17, 1994

Hon. Edward M Kennedy, Chairman
Senate Labor & Human Resources Committee
614 Hart Senate Office Building
Washington, D.C. 20510

Re: ERISA Preemption S. 1580 (HR 1036)

Dear Senator Kennedy:

The purpose of this letter is to provide additional information regarding the need for passage of the ERISA Preemption Bill, S. 1580/H.R.1036. Specifically it is intended to clarify issues raised in testimony presented at the March 10, 1994 Sub-Committee on Labor hearing on this bill by Messrs. Mark Thierman and Leo Garcia on behalf of the Associated Builders and Contractors of America, and the Associated General Contractors of America respectively, regarding the impact of S. 1580 on state regulation of apprenticeship training programs. Both of these witnesses testified against the bill on the basis of its alleged harmful impact on non-union apprenticeship programs, and on training opportunities for minorities and women. This letter will respond to the contentions raised in their testimony.

1.) In written testimony submitted to the Subcommittee Mr. Thierman addressed the 1989 Hydrostorage decision in which the 9th Circuit Court declared the California apprenticeship law to be preempted by ERISA. He stated *"Invalidated were the California and Nevada state laws that essentially prevented non-union employers from training their own workers."* It is difficult to give serious consideration to this charge in light of the facts:

- On March 4, 1988 the Associated Builders & Contractors (ABC) of San Diego, Inc, Joint Apprenticeship Committee, was certified by the California State Apprenticeship Council to train electrician and carpenter apprentices in San Diego County;

- On March 4, 1988 the San Diego Associated General Contractors Joint Apprenticeship Committee, of which Mr. Leo Garcia is the Director, was certified to train painter, drywall/lather, drywall finisher, cement mason, carpenter, tile setter, tile and marble finisher apprentices in San Diego County;

- On July 28, 1988, the Southern California Chapter, Associated Builders & Contractors, Inc. Joint Apprenticeship Committee, received its certification from the state to train electrician apprentices in Orange, Riverside, and San Bernardino Counties of California.

Each of these approvals was made according to the provisions of the state law later declared to be preempted by the Hydrostorage case and which Mr. Thierman claimed *"prevented non-union employers from training their own workers"*.

2.) In the written testimony presented on behalf of the Associated General Contractors of America Mr. Leo Garcia also speaks of state laws presenting an unfair barrier to the

expansion of training programs such as the one he directs for the AGC of San Diego, writing that "*Restrictions and roadblocks have prevented expansion.*" It is all too often that people view government agencies as "roadblocks" when in fact these agencies are properly fulfilling their duties to provide oversight and enforcement for publicly-supported programs.

A review of the AGC of San Diego training program by the Controller of the State of California's State Agency Audits Branch offers an example of an agency providing such appropriate oversight. In a January 19, 1993 letter from James D. Ferguson, Chief of the State Agency Audits Branch, Division of Audits, to Gail W. Jessweln, Chief of the Division of Apprenticeship Standards (DAS) of the California Department of Industrial Relations, the following problems with the operation of the San Diego AGC training program were discussed:

> *"A limited review of 1991-92 state payments for Associated General Contractors (AGC) sponsored apprentice training in San Diego raised fiscal concerns which warrant further investigation by the Division of Apprenticeship Standards (DAS).*
>
> *Specifically:*
>
> - *Only 25 percent of the AGC apprentices completed 144 hours of annual instruction required by Article XI of the AGC Apprentice Standards approved by DAS May 5, 1988. This compares to an 81 percent completion rate for another state funded apprenticeship program serving the same San Diego Area. Given the limited resources available and great disparity in the performance of the two programs, we suggest that DAS consider any appropriate steps that might improve the effective use of these public funds.*
>
> - *$8,246 or 15% of the state funding for the AGC program will be recovered by the Local education agency due in part to the improper inclusion of unregistered apprentices in claims for payment. We suggest DAS publish current listings of valid apprentices by trade and sponsor, or take other steps that would ensure timely communication of this critical registration data.*
>
> *(The Division of Labor Standards Enforcement also expressed a need for this registered apprentice information in order to confirm the propriety of apprentices reported on public works projects. Accordingly, it may be willing to assist your division with resources needed to publish such a list.)*
>
> *AGC apprentices were improperly advance based on completion of 700 hours of work experience. This action was contrary to supplemental instruction minimum requirements set forth in Article XI of the AGC Apprentice Standards, and is a direct contradiction to the advancement requirements set forth in Section VII of the AGC Apprentice Rules and Regulations.*
>
> *We suggest that DAS review current and prior AGC apprentice graduates to ensure each received the level of supplemental instruction required for legally certified journeymen."*

While Mr. Garcia was undoubtedly anxious to expand his program as rapidly as possible, it is clear that the state was exercising reasonable caution in protecting the interests of both California taxpayers who provide financial support to these programs and the trainees enrolled in the AGC program who are relying on receiving full and complete training. We believe that this oversight function becomes even more important when the programs in question are operating without an independent

employee organization capable of representing the interests of the apprentices.

This oversight role is, in addition, vital to the legitimate interests of broadening training opportunities for women and minorities, an area in which the state of California has a commendable record of activity. A review of data compiled by the State of California Department of Industrial Relations (DIR) Division of Apprenticeship Standards (DAS) for the California Plan Compliance Review of Apprenticeship Program Sponsors from 1987 - 1992 shows steady progress in minority and women participation in all state apprenticeship programs (see figure 1 attached).

In conclusion Mr. Chairman, the facts do not substantiate the claims made by either the AGC or the ABC regarding the impact passage of S. 1580 (H.R. 1035) apprenticeship training. The training programs they operate in California were approved before the ERISA preemption cases were decided, and the statistics offered from the State of California's Department of Apprenticeship Standards show that training opportunities for women and minorities are well served in union-management Joint Apprenticeship Training Committees. Passage of this legislation will in fact ensure that the states are able to continue to play the vital role of setting local training standards, and providing oversight for the implementation of those standards.

Thank you for your consideration of these comments.

Sincerely,

William G. Kuddy,
Executive Director

California Apprenticeship Programs: Figure 1
Women & Minority Participation - All Trades

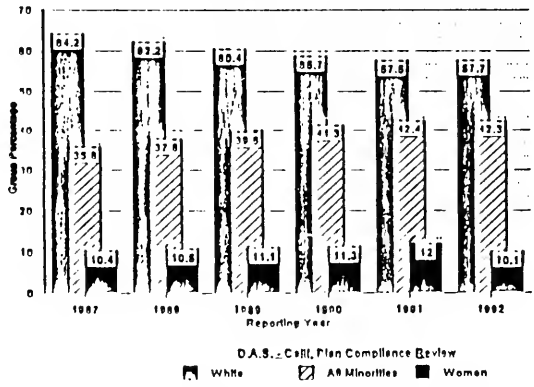

Figure 1 is drawn from statistics compiled in accordance with Calif. Labor Code Sec. 3073.8; printed in the Dept. of Industrial Relations Division of Apprenticeship Standards & California Apprenticeship Council Special Report - 1992 Activities.

Senator WOFFORD. The committee is adjourned.

[Editor's note—Due to the high cost of printing, the attachments 1 through 6 submitted by the Department of Labor and Industries, State of Washington are retained in the files of the committee.]

[Whereupon, at 4:34 p.m., the committee was adjourned.]

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